TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 299

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, ETC., PETITIONER

vs.

ISADORE N. HELLMAN

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Writ of Error.

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Isadore N. Hellman, Plaintiff,
No. 6989. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The President of the United States, To the Honorable Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri—Greeting:

Because, in the record and proceedings, and in the rendition of the judgment in a cause which is in the District Court, before you, at the March Term, 1925, wherein Isadore N. Hellman was plaintiff and Arnold J. Hellmich, Collector, was defendant, it is alleged manifest error hath happened to the injury and damage of the defendant, as by its complaint appears.

Therefore, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the 8th Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the 8th Circuit on or before the 10th day of January, 1926, to the end that the records and proceedings aforesaid being inspected,
2 the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

Witness, the Honorable Chas. B. Faris, Judge of the District Court of the United States within and for the Eastern District of Missouri this 10th day of November, 1925.

Seal
East. Div.
East. Jud. Dist.
of Missouri.

Issued at office in in the City of St. Louis with the seal of the District Court and dated as aforesaid.

JAS. J. O'CONNOR
Clerk, District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Allowed by:
C. B. Faris, Judge.

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2 Return to Writ.

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Isadore N. Hellman, Plaintiff,
No. 6989. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

In obedience to the command of the within and foregoing writ, I herewith transmit to the United States Circuit Court of Appeals for the 8th Circuit a duly certified transcript of the record and proceedings in the above-entitled cause, with all things concerning the same.

Seal
U. S. Dist. Court
East. Div.
East. Jud. Dist.
of Missouri.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said District Court, at office in the City of St. Louis, this 9th day of January, 1926.

JAS. J. O'CONNOR
Clerk.

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4 Citation.

In the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri.

Isadore N. Hellman, Plaintiff,
No. 6989. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The United States of America to Isadore N. Hellman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In Witness Whereof, I the undersigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this 10th day of November, in the year one thousand nine hundred and twenty-five.

C. B. FARIS,
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

HENRY H. FURTH,
Attorney for Plaintiff.

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5 United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered, that heretofore to-wit: on the 17th day of February, 1925, there was filed in the office of the Clerk

of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a petition wherein Isadore N. Hellman is Plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is Defendant, Cause No. 6989 At Law, which said petition is in words and figures as follows, to-wit:

6 (Petition.)

Filed February 17, 1925.

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

March Term, 1925.

Isadore N. Hellman, Plaintiff,
6989. vs.
Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, Defendant.

The plaintiff for his cause of action against defendant alleges as follows:

That plaintiff is a citizen of the United States and at all times hereinafter mentioned, resided and now resides in the City of St. Louis in the State of Missouri.

That the defendant was in the year 1923 and now is the duly appointed Collector of United States Internal Revenue for the First District of Missouri.

That this is a suit of a civil nature at common law, arising under the constitution and laws of the United States and under the laws of the United States pertaining to Internal Revenue.

That the plaintiff was on the 31st day of December, 1919 the owner of one half of the capital stock of Hellman & Sons Fur & Wool Company, a corporation organized and incorporated under the laws of the State of Missouri and carrying on business in the City of St. Louis as a dealer in furs and wool; that capital was a material income-producing factor in the business of said corporation and fifty (50%) per cent or more of its gross income consisted of gains and profits derived from trading as a principal.

That the books of account of said corporation showed that on said 31st day of December 1919 its paid-up capital stock was Twenty-seven Thousand Six Hundred Dollars ($27,600)

and its surplus was Sixty-one Thousand, Five Hundred
7 Sixty and 26/100 Dollars ($61,560.26); that on said day said corporation was also indebted to the United States for income tax and excess profits tax on its income for the calendar year 1919, the exact amount of which had not been ascertained and which did not appear on its books, but was later determined to be Fifteen Thousand Ninety-three and 99/100 Dollars ($15,093.99) leaving a net surplus at that time of Forty-six Thousand Four Hundred Sixty-six and 27/100 Dollars ($46,466.27 [Dollars]; that of said surplus at least Thirty-one Thousand, Five Hundred Forty-five and 58/100 Dollars ($31,545.58) consisted of earnings and profits accumulated by said corporation since February 28, 1913.

That on said 31st day of December 1919 said corporation was duly dissolved and liquidated, the assets thereof were distributed to the shareholders of said corporation in accordance with their several interests therein, and they assumed the liability of said corporation to the United States for taxes on its income for 1919.

That in said liquidation plaintiff realized a gain of Fifteen Thousand, Four and 55/100 Dollars ($15,004.55), all of which consisted of plaintiff's share of the surplus of said corporation and was a distribution made by said corporation to its stockholders out of its earnings or profits accumulated since February 28th 1913 and as such, was taxable to plaintiff as a dividend, as dividends are defined in Section 201 (a) of the Revenue Act of 1918.

That on or before the 15th day of March 1920 plaintiff made and filed with the Collector of United States Internal Revenue for the First District of Missouri, a return of his income, gains and profits for the calendar year 1919 in the manner and form prescribed by law; that plaintiff's total
8 taxable net income for said calendar year 1919 was Twenty-five Thousand, Ninety-nine and 50/100 ($25,099.50) Dollars derived from the following sources to-wit:

Salary	$10,012 50
Profit from the liquidation of Hellman & Sons Fur & Wool Co.	15,004.55
Other income	165.86
Taxable interest on U. S. obligations	56.07
	$25,238.98
Less allowable deductions	139.48
Net taxable income	$25,099.50

That under the provisions of Section 216 Subdivisons (a), (b), (c) of the Revenue Act of 1918 the plaintiff was entitled to the following credits for the purpose of the normal tax only, to-wit:

Subd. (a) The amount of the dividend, that is say, the gain realized by him from the liquidation of Hellman & Sons Fur & Wool Co.,	$15,004.55
Subd. (a) The amount of the dividend, that is to obligations of the United States and included in gross income,	56.07
Subd. (c) Personal exemption,	1,000.00
Total credits,	$16,060.62

That plaintiff's net income for the calendar year 1919 subject to normal tax was Nine Thousand, Thirty-eight and 88/100 Dollars ($9,038.88) of which said income the sum of Four Thousand Dollars ($4,000.00) was taxable at four (4%) percent and the remainder was taxable at eight (8%) percent; that the total normal tax due from plaintiff on his said income was Five Hundred Sixty-three and 12/100 Dollars ($563.12); that the surtax assessable thereon was One Thousand Two Hundred Ten and 95/100 Dollars ($1,210.95) and the total tax due from plaintiff on his income for the calendar year 1919 was One Thousand Seven Hundred Seventy-four and 07/100 Dollars ($1,774.07).

That thereafter, to-wit: on or about the 30th day of July 1923, the Commissioner of Internal Revenue gave
9 notice to plaintiff that an examination of plaintiff's income tax returns for the years 1919 and 1920 disclosed an additional tax liability on the part of plaintiff for Two Thousand, Three Hundred and Twenty-one and 35/100 Dollars ($2,321.35) for the year 1919 and an over-assessment of On Thousand Fifty and 49/100 Dollars ($1,050.49) for the year 1920, that is to say, a net tax liability of One Thousand Two Hundred Seventy and 86/100 Dollars ($1,270.86) and granted plaintiff thirty (30) days within which to file an appeal and show cause why such additional tax of Two Thousand, Three Hundred Twenty-one and 35/100 Dollars ($2,321.35) for the year 1919 should not be paid.

That thereafter, to-wit: on or about the 28th day of August 1923 plaintiff admitted liability for an additional tax of One Thousand One Hundred Twenty-one and 00/100 Dollars ($1,121.00) for the calendar year 1919, but denied liability

for the remainder of the alleged demand, to-wit: the sum of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35) and appealed to the Commissioner of Internal Revenue and showed cause why said amount of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35) should not be paid.

That thereafter to-wit: on or about the 8th day of January, 1924 said Commissioner of Internal Revenue advised the plaintiff that his appeal had been denied and that said additional tax of Two Thousand Three Hundred Twenty-one and 35/100 Dollars ($2,321.35) on his income for the calendar year 1919 would be assessed against him.

That the Commissioner of Internal Revenue thereupon recomputed plaintiff's tax on his income for the calendar year 1919 and reassessed the same as follows:

Said Commissioner allowed the plaintiff the following credits:

Taxable interest on U. S. Bonds,	$ 56.07
Personal Exemption,	1,000.00
	$1,056.07

But said Commissioner failed and refused to allow as a credit for the purpose of the normal tax as provided in Section 216 (a) of the Revenue Act of 1918, the sum of Fifteen Thousand, Four and 55/100 ($15,004.55) Dollars the gain realized by plaintiff in the liquidation of Hellman & Sons Fur & Wool Company, but included the same in the income subject to the normal tax, although it fully appears that said gain consisted of a distribution by said corporation to its shareholders out of its earnings or profits accumulated since February 28th, 1913, and said Commissioner of Internal Revenue assessed against plaintiff on his income for the calendar year 1919, including said gain of Fifteen Thousand Four and 55/100 Dollars ($15,004.55) in the liquidation of said corporation, a normal tax of One Thousand Seven Hundred Sixty Three and 47/100 Dollars ($1,763.47) and a surtax of One Thousand, Two Hundred Ten and 95/100 Dollars ($1,210.95) the total tax for said year assessed against plaintiff being, Two Thousand Nine Hundred Seventy-four and 42/100 Dollars ($2,974.42).

That thereafter, to-wit: on or about the 12th day of April 1924 defendant served notice on plaintiff of the assessment of said additional tax of Two Thousand Three Hundred

Twenty-one and 35/100 Dollars ($2,321.35) on plaintiff's income for the calendar year 1919 and of the credit of One Thousand Fifty and 49/100 Dollars ($1,050.49) the over-assessment against plaintiff for the year 1920, applying the same as a credit against said additional assessment of Two Thousand Three Hundred Twenty-one and 35/100 Dollars ($2,321.35), and defendant duly demanded of plaintiff payment of the sum of One Thousand Two Hundred Seventy and 86/100 Dollars ($1,270.86), being the amount of said additional assessment for the calendar year 1919, diminished by the amount of the over-assessment of One Thousand Fifty and 49/100 Dollars, ($1,050.49) for the calendar year 1920.

That on the 1st day of May 1924 plaintiff paid to defendant voluntarily, the sum of Seventy and 51/100 Dollars ($70.-51) the amount which plaintiff admitted to be due from him to the United States on account of balance of the tax on his income for the year 1919, and at the same time, in order to avoid distraint and penalties, paid to defendant, under protest, the sum of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35) the amount assessed against him by the Commissioner as additional tax on his income for 1919, for which liability is denied by plaintiff.

That thereafter, to-wit: on or about the 4th day of June 1924 plaintiff filed a claim with the Commissioner of Internal Revenue for the refund of said sum of One Thousand Two Hundred and 35/100 Dollars ($1,200.35) so paid
11 by plaintiff under protest.

That on or about the 12th day of November 1924 plaintiff was advised by said Commissioner of Internal Revenue, that his said claim for refund had been denied by said Commissioner of Internal Revenue.

That inasmuch as said gain of Fifteen Thousand, Four and 55/100 ($15,004.55) Dollars realized by plaintiff in the liquidation of the aforesaid corporation, said Hellman & Sons Fur & Wool Company, and returned by plaintiff as part of his income for the calendar year 1919, was a distribution made by said corporation to its shareholders out of earnings and profits accumulated by it since February 28th, 1913, said gain constituted a dividend as defined in Section 201 (a) of the Revenue Act of 1918 and was not subject to the normal income tax; and that the normal tax at the rate of eight (8%) percent assessed thereon was improperly and illegally assessed against the plaintiff and the collection of said tax

from the plaintiff by the defendant was improper and illegal, and the plaintiff is entitled to recover the same.

Wherefore, plaintiff demands judgment against the defendant in the sum of Twelve Hundred and 35/100 Dollars ($1200.35) with interest thereon at the rate of six (6%) percent per annum from the 1st day of May 1924 together with the costs and disbursements of this action.

(Signed) HENRY H. FURTH,
Attorney for Plaintiff,
720 Rialto Bldg., St. Louis.

State of Missouri,
City of St. Louis—ss.

ISADORE M. HELLMAN, the plaintiff herein, being first sworn according to law, makes oath and says that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

(Signed) ISADORE M. HELLMAN.

Subscribed and sworn to before me this 13th day of February 1925.

(Seal) (Signed) L. C. DIETRICH,
Notary Public.

My Commission expires Feb. 10, 1929.

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12 (Demurrer of Defendant to Petition.)

Filed March 23, 1925.

Comes now Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the defendant in the above styled cause, by his attorney Claude M. Crooks, Assistant United States Attorney, and demurs to the petition herein, for the reason that the said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

(Signed) CLAUDE M. CROOKS.

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13 (Order of Submission of Demurrer to Petition.)

June 1, 1925.

Now on this day comes plaintiff by his attorney and comes also defendant by the United States District Attorney for

the Eastern Judicial District of Missouri; whereupon the demurrer of the defendant to the petition of plaintiff is by agreement of parties submitted to the Court on briefs to be hereafter presented.

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14 (Order overruling Demurrer to Petition.)

July 7, 1925.

Now on this day the Court having considered the demurrer of defendant to the petition of plaintiff herein, being fully advised in the premises, doth Order that said demurrer of defendant be, and it is hereby, overruled. (Oral Opinion.)

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15 (Record Entry of Filing of Opinion on Overruling of Demurrer to Petition.)

July 10, 1925.

Now on this day there is received and filed herein memo of oral opinion of Court on demurrer of defendant to petition.

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16 Memorandum of Oral Opinion of the Court.

This case was submitted to the Court some days since on a demurrer of the defendant to the petition of plaintiff.

Plaintiff sues defendant, as the Collector of Internal Revenue for the First District of Missouri, to recover the sum of $1,200.35 paid by him under protest, as a normal income tax on the sum of $15,004.55, derived, as the petition alleges, from plaintiff's one-half share in the surplus and profits of the Hellman & Sons Fur & Wool Company, which surplus and profits had accumulated since February 28th, 1913.

The above-named Company went into voluntary liquidation on the thirty-first day of December, 1919, and the capital stock, presumably, and the said surplus and profits, as it is alleged, were distributed among the plaintiff and one other, who, it seems, constituted all of the stockholders of this corporation.

When the above Company was liquidated it had a capital stock of $27,600.00, held, as already said, and surplus and profits of $61,560.26. This latter sum of surplus and profits was, it seems, ultimately reduced to the sum of $30,009.60,

by deductions and exemptions of a sort not pertinent to this inquiry. The sum which remains thereupon was divided between plaintiff and another, each of whom took one-half as each, as said, had theretofore held one-half of the capital stock of the liquidating company. I am dealing here, so far as the petition is concerned (by which alone I am bound, and with which alone I am concerned) with the surplus and profits accruing since February 28th, 1913. What became of the capital stock does not appear, nor is it in issue or pertinent, so far as the petition is concerned.

17 To the plaintiff's petition, setting forth, in effect, the facts above stated, defendant demurs generally, for that the petition does not state facts sufficient to constitute a cause of action against the defendant. The briefs on both sides concede that the single question is whether said sum of $15,004.55 was, or was not, subject to the normal tax of eight per cent., which is taxable by law as ordinary income.

The plaintiff contends that it was not so subject; the defendant contends contra. Both sides agree that the question mooted is to be solved by a determination of whether the sum of $15,004.55, tax on which is in dispute, fell under the provisions of subdivision (a) of Section 201 of the Revenue Act of 1918, or whether it fell under the provisions of subdivision (c) of said Section 201.

Plaintiff says that under the pleaded facts he is to be taxed under the provisions of subdivision (a) of the above section, while defendant contends that he falls within the purview of subdivision (c) of said section. Upon these opposite contentions both sides agree that the case turns.

So, it is obvious, without any further consideration of the law or of the statutes, that a decision of this mooted point will decide this case.

Skelitonized, so as sharply to present the point mooted, subdivision (a) of section 201, supra says:

"Sec. 201. (a) That the term 'dividend' when used in this title * * * * means (1) any distribution made by a corporation * * * * to its shareholders or members, whether in cash, or in property, or in stock of the corporation, out of its earnings or profits accumulated," since February 28, 1913.

Now, while it is also pleaded that the corporation was dissolved and liquidated on December 31, 1919, it is further pleaded that the sum of $15,004.55, tax on which is in dispute was distributed to plaintiff out of the net surplus and profits which had accumulated since February 28, 1913. The distribution, as far as the value of the capital stoct of $27,600.00 is concerned, is not disclosed and, as already forecast, such stock is only mentioned incidentally, and as a part of the history of the case, and the question of what became of it is not in controversy here.

Upon these pleaded facts defendant contends that subdivision (c) of Section 201 applies. This subdivision provides:

"(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or stock distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

From a reading of this subdivision it is clear that the case as pleaded does not fall into the category of the first sentence of subdivision (c), because the payment here was not made in stock, issued to the amount of the surplus and earnings accumulated.

The second sentence of subdivision (c) of Section 201, supra, says that

"Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

It will be noted therefore, that upon the face of subdivision (a) of section 201 supra, plaintiff falls precisely within its terms. The statute says "any distribution" shall constitute a dividend. A dividend is subject to a surtax, but not to a normal tax, as was here collected. This is so far the reason that such a dividend has already been charged with a normal tax at its source, and so ought not to be so charged a
19 second time, but ought of course, to be charged against the tax payer for the purpose of levying thereon a surtax as provided by statute.

I am of the view that subdivision (c) of section 201 is merely supplemental to subdivision (a) of said section. Gains might well accrue from the fact that the capital stock when

acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore, should bear not only a surtax in a proper case, but a normal tax also.

The words "realized thereby", as used in subdivision (c) supra, mean realized by the process or transaction of payment in exchange for stock or shares.

I have, correctly, I think, already eliminated the first sentence of this subdivision as inapplicable to the case as pleaded, and it will be observed that the last sentence of subdivision (c), supra, says nothing as to surplus of profits accumulated and distributed at the same time as capital is distributed.

This, I think, is taken care of by the provisions of subdivision (a) supra, even in a case of liquidation, wherein the surplus and profits accumulated since February 28, 1913, are involved and were distributed.

So construed, as supplemental to each other, well-known legal and objectionable evils are avoided, and a definite field, in no wise conflicting, is found for the operation and application of both subdivisions. Otherwise construed those provisions seem in hopeless conflict with each other.

The word "any", as used in subdivision (a) supra, is a broad term. It may well embrace distribution of surplus and profits accruing since February 28th, 1913, even though such surplus and profits are distributed upon final liquidation of the Company in which they accrue.

Moreover, subdivision (c) supra, does not in terms preclude this view; it merely says "other gains and profits." A dividend is a gain and a profit, and so a dividend is included in the term "gains and profits", and is made taxable, not as income, however, but as a dividend; that is, it is subject to the surtax only, and not to a normal tax.

No taxing statute ought, if it can be avoided, to be so construed as to levy a double income tax on identically the same money, and unless there is a plain, unambiguous statute so warranting, no tax ought to be exacted, or can be exacted. This latter rule is well settled. The former rule mentioned is a well known rule of construction.

It is fundamental, that a court is ordinarily not bound by the construction put upon the statute by the Commissioner of Internal Revenue. If such Commissioner construe a statute correctly, well and good; if he construes it erroneously, then the courts alone are saddled with the duty of authoritatively deciding what a statute means.

No regulation by the Treasury Department, which has the effect to bring one not required by statute to pay a tax, within the purview of such a statute, can stand; and, while it is regrettable that I can not agree with the Department's construction of these statutes, which is wholly in conflict with these views, plain rules of statutory construction have been, in my opinion, violated by the departmental view and by departmental regulation in attempting to construe the two statutes here dealt with in the expression of these views.

As forecast, I think I can see a field wherein subdivi-
21 sion (c) of Section 201 supra, may well operate, without the necessity of holding it in conflict with subdivision (a) of said section. This field, or one of the fields, at least, I have attempted to point out; there may be others. When this view is taken of it, the situation does not present one of double taxation, and the construction intended by Congress is rendered unambiguous. I am constrained to think that the view taken by the Treasury Department, as expressed in the Regulation under discussion, has the effect to doubly tax a single fund, and has the effect to exact a tax upon a section wholly ambiguous, and ambiguous to the extent that no valid tax can be collected thereunder.

I think the demurrer should be overruled, and so it is ordered.

(Order overruling Demurrer, etc.)

The demurrer in this case will be overruled, for the reasons given in case No. 6989.

These two cases are companion cases; what is said in one is wholly applicable to the other.

St. Louis, Missouri. July 7, 1925.

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22 (Judgment, September 12, 1925.)

Now on this day comes plaintiff in the above entitled cause by his attorney and comes also defendant by the

United States District Attorney for the Eastern Judicial District of Missouri, and it appearing to the Court that defendant heretofore filed herein his demurrer to the petition of plaintiff, which demurrer was overruled, and defendant now in open court through said United States District Attorney declining to plead further herein, it is, therefore, on motion of said plaintiff by his attorney Ordered that judgment be entered herein in favor of plaintiff and against defendant in the sum of Twelve Hundred Dollars and Thirty-five Cents ($1200.35), together with interest thereon at the rate of six per cent per annum from May 1st, 1924, to date, such interest amounting to the sum of Ninety-eight Dollars and Eighty-three Cents ($98.83), making the aggregate finding and award of judgment in favor of plaintiff and against defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18);

It is, therefore, pursuant to action of defendant and finding and award by the Court as aforesaid, Ordered and Adjudged that plaintiff, Isadore M. Hellman, have and recover of defendant, Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the sum of Twelve Hundred Dollars and Thirty-five Cents, ($1200.35), together with interest thereon at the rate of six per cent per annum from May 1st, 1924, to date, such interest amounting to sum of Ninety-eight Dollars and eighty-three Cents ($98.83) making an aggregate judgment in favor of said plaintiff and against said defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18), and that plaintiff also recover of defendant his costs and charges herein expended.

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23 Order for Enlarging time for Filing Bill of Exceptions.

September 18, 1925.

Comes now Allen Curry, United States Attorney for the Eastern Division of the Eastern Judicial District of Missouri, on behalf of the above styled defendant, Arnold J. Hellmich, Collector, and makes application for an order extending the time for filing of the Bill of Exceptions herein, and cause being shown therefor, and such application is granted and the time for the filing of the Bill of Exceptions of the above named defendant is extended for sixty days from and after September 18, 1925.

(Signed) C. B. FARIS.
Judge.

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24 (Record Entry of filing of Petition for Writ of Error, etc.)

November 10, 1925.

Now on this day comes defendant in the above entitled cause and files herein his petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, together with his assignment of errors on such proposed writ of error, upon consideration whereof the Court doth Order that a writ of error be, and is hereby, allowed defendant as prayed. And now a citation is issued to plaintiff, citing and admonishing him to be and appear in said United States Circuit Court of Appeals within sixty days from and after this date, which citation is duly filed.

And now defendant files herein his praecipe for transcript on such writ of error, as well as election as to the printing of such transcript.

Petition for Writ of Error.

25 Filed November 10, 1925

Now comes the above named defendant, Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri and shows to the Court that on the 14th day of September, 1925 in this Court a final judgment was rendered in the above entitled cause in favor of the plaintiff, and defendant avers that in the record and proceedings had in said cause and also in the rendition of said judgment therein, certain errors were committed to the prejudice and injury of the defendant, all of which appear in detail in defendant's assignment of errors, which is filed in this cause with this petition for Writ of Error.

Wherefore, defendant prays that a writ of error may issue in his behalf returnable to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of the errors so complained of, and for the reversal of judgment entered in said cause; that a citation be issued by the Court directed to the plaintiff and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals, and for such further orders as may be proper in the premises.

(Signed) CLAUDE M. CROOKS
Assistant United States Attorney,
Attorney for Defendant.

To the Clerk of This Court:

The above petition is granted, let the writ issue as prayed.

(Signed) C. B. FARIS, Judge.

Assignment of Errors.

Filed November 10, 1925

26 Now comes the defendant in the above entitled cause and presents to the Court his assignment of errors which he alleges were committed in the record and proceedings had in said cause, and also in the rendition of said judgment in the above cause, to his prejudice and injury as follows:

I.

In overruling defendant's demurrer to plaintiff's petition.

Wherefore, because of the error herein above assigned, defendant prays that the judgment entered by the District Court in the above cause be reversed and set aside.

(Signed) CLAUDE M. CROOKS,
Assistant United States Attorney,
Attorney for Defendant.

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27 (Copy of Citation and Acknowledgment of Service.)
The United States of America to Isadore N. Hellman —Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In witness whereof, I, the undesigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this ..... day of November, in the year one thousand nine hundred and twenty-fve.

(Signed) C. B. FARIS,
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

(Signed) HENRY H. FURTH,
Attorney for Plaintiff.

Praecipe for Transcript and Election as to Printing.

28 Filed November 10, 1925.

To, James J. O'Connor,
Clerk, United States District Court.

You are hereby notified that the defendant in the above entitled cause, in which a Writ of Error has been issued to the United States Circuit Court of Appeals for the 8th Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to-wit:

1. Petition.
2. Demurrer.
3. Memorandum of Oral Opinion of Court on Demurrer.
4. Record of entries of judgment.
5. Order Granting Writ of Error.
6. Order granting time to file Bill of Exceptions.
7. Order showing filing of same.
8. Petition for Writ of Errors.
9. Assignment of Errors.
10. Writ of Error and your return to same.
11. Citation.
12. Praecipe for transcript and certificate of Clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the Clerk of Said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals said

transcript here requested, in accordance with the rules of said Court of Appeals.

(Signed) CLAUDE M. CROOKS,
Attorney for Defendant.

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29 (Clerk's Certificate to Transcript.)

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify, that the foregoing is a full, true and complete transcript of the record and proceedings in Cause No. 6989, At Law, wherein Isadore N. Hellman is plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First Internal Revenue District of Missouri is defendant, (except insofar as the same is restricted by the praecipe for transcript heretofore set out) as fully as the same remains on file and of record in my office, and that the Original Citation and writ of Error are hereto attached and herewith returned.

Seal
U. S. Dist. Court
East. Div. of East.
Jud. Dist. of Mo.

In Witness Whereof, I hereunto subscribe my name and affiix the seal of said Court at office in the City of St. Louis, in the Eastern Division of said District, this 9th day of January, in the year of our Lord, One thousand nine hundred and twenty-six.

JAS. J. O'CONNOR
Clerk of said Court
By Joseph T. Spelman, Deputy.

Filed Jan. 9, 1926, E. E. Koch, Clerk.

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20 [Appearances of counsel; omitted in printing.]

21-22 ½ [Minute entry of argument and submission, Dec. 22, 1926; omitted in printing.]

23 In United States Circuit Court of Appeals, Eighth Circuit

No. 7298. December term, A. D. 1926

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, ETC., plaintiff in error

vs.

ISADORE N. HELLMAN, DEFENDANT IN ERROR

In error to the District Court of the United States for the Eastern District of Missouri

Mr. John R. Wheeler, special attorney, Bureau of Internal Revenue (Mr. Louis H. Breuer, United States attorney, Mr. Claude M. Crooks, assistant United States attorney, and Mr. A. W. Gregg, general counsel, Bureau of Internal Revenue, were with him on the brief), for plaintiff in error.

Mr. Henry H. Furth for defendant in error.

Before KENYON, Circuit Judge, and MOLYNEAUX and OTIS, District Judges

Opinion

Filed March 18, 1927

KENYON, Circuit Judge, delivered the opinion of the court.

Defendant in error was plaintiff in the trial court and will for convenience so be designated here. Likewise plaintiff in error will be designated as defendant.

Plaintiff brought suit to recover certain additional income taxes alleged to have been erroneously assessed and collected from him for the calendar year 1919. Defendant demurred to the petition.

The trial court overruled the demurrer. Defendant electing to
24 proceed no further, judgment was entered for plaintiff. The statements of the petition, taken as true for the purposes of the demurrer, establish that plaintiff on December 31, 1919, was the owner of one-half of the capital stock of Hellman & Sons Fur and Wool Company, a corporation of the city of St. Louis, Missouri. This corporation on that date entered into voluntary liquidation. The surplus and profits were distributed between the plaintiff and one other, they being all the stockholders of the corporation. The

corporation had a capital stock of $27,600.00, and a net surplus on December 31, 1919, of $46,466.27, of which $31,545.58 was earnings and profits accumulated by the corporation since February 28, 1913. Plaintiff realized a gain of $15,004.55, which he indicated in his return of income for the year 1919, but excluded from income subject to normal tax. He paid the surtax. The distribution so far as pertains to the capital stock is not disclosed by the record. The Commissioner of Internal Revenue held that plaintiff was subject to a normal tax upon the amount of $15,004.55, which plaintiff paid, and in this action sought to recover back the same. The District Court entered judgment therefor.

The issue is whether that part of the gain realized in the liquidation of the corporation, which is in fact a distribution of earnings or profits accumulated since February 28, 1913, is a dividend and therefore under the revenue act of 1918 not subject to the normal tax.

The revenue act of 1918 (40 Stat. L., chap. 18, Title 2, p. 1059), contains the following provisions applicable to this transaction:

"SEC. 201. (a) That the term 'dividend' when used in this title (except in paragraph (10) of subdivision (a) of section 234) means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since Febuary 28, 1913, or (2) any such distribution made by a personal service corporation out of its earnings or profits accumulated since February 28, 1913, and prior to January 1, 1918.

* * * * * * *

"(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

"SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the revenue act of 1916 and by section 1 of the revenue act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

"(a) For the calendar year 1918, 12 per centum of the amount of the net income in excess of the credits provided in section 216."

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived * * * from * * * dividends * * *. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period."

"SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

"(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by act of Congress."

It is conceded that a dividend from a going corporation paid out of current earnings is not subject to the normal income tax. Section 216 of the act so provides. But it is contended by defendant that there is a difference between dividends as defined in section 201 (a) and distributions in complete liquidation of the corporation under section 201 (c). Subdivision (a) uses the term "any distribution," which covers "every distribution." There could be no question that the distribution made by this corporation to plaintiff would be squarely within its definition of a dividend, unless subdivision (c) limits or changes the same. Section 201 (a) provides that the term "dividend" shall have the meaning therein given "when used in this title (except in paragraph 10 of subdivision (a) of section 26 234.)" This section does not pertain to any question involved here. It is apparent that section 201 (a) intends to provide a definition for the term "dividend" as used throughout the title, with the one exception referred to. The term "dividend" as used in section 216 (a) with reference to normal tax therefore has the meaning given to it in section 201 (a), which makes a distribution by a corporation to shareholders out of its earnings or profits accumulated since February 28, 1913, a dividend.

Is this changed by subdivision (c) of section 201?

Defendant contends that construing subdivision (a) and subdivision (c) of section 201 together it is manifest that subdivision (c) is in the nature of a limitation upon, or exception to, subdivision (a) and takes out of the realm of dividends gains or profits realized in liquidation of a corporation even if the distribution be of earnings or profits accumulated since February 28, 1913; that the situation is exactly the same as if plaintiff had sold his stock to another person and realized profit thereby; that the transaction is an exchange of the assets of the corporation for the outstanding stock; and that the gain or profit realized thereby is to be taxed to the distributee as other gains or profits, and that other gains or profits are subject to the normal tax.

In this connection we set out regulation 45, Article 1548, of the Treasury Department referring to this subject as follows:

"Distribution in liquidation: So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost, but less

than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock of March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable
27 from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock."

Of course this regulation sustains defendant's position. Congress has bestowed upon the Treasury Department the right to make needful rules and regulations for the enforcement of the provisions of the revenue act, and such regulations construing the laws of Congress relating to taxation are instructive, helpful, influential. This regulation is based on the Treasury Department's construction of the statute in question. We are not of course concluded thereby. Hemmer et al. v. United States, 204 Fed. 898.

Since the decision of this case by the trial court the United States District Court for the Western District of Kentucky in Langstaff v. Lucas, 9 Fed. (2d) 691, 694, has held along the line of the position urged by defendant in this case. That case was affirmed by the Circuit Court of Appeals of the Sixth Circuit (13 Fed. (2d) 1022) in a very short opinion, in which the court said that it affirmed the judgment upon the reasoning and conclusions of the district judge. The District Court in that case under facts somewhat similar to those here held that the distribution to Langstaff was not a "dividend as generally understood, and as defined in section 201, subsection (a), and as used in section 216." The court says: "Loosely speaking, the distribution to the stockholders of a corporation's assets, upon liquidation, might be termed a 'dividend'; but this is not what is generally meant and understood by the word. As generally understood and used, a dividend is a return upon the stock of its stockholders, paid to them by a going corporation without reducing their stockholdings, leaving them in a position to enjoy future returns upon the same stock." It is apparent that the court based its definition of the term "dividend" upon Lynch v. Hornby, 247 U. S. 339. And in this connection reference may also be made to Lynch v. Turrish, 247 U. S. 221, which is a companion case to Lynch v. Hornby. Article 1548 of regulation 45 of the Treasury Department, supra, is also evidently based upon the holdings of these two cases. In Lynch v. Hornby, supra, the court did draw a distinction between a distribution received as a single and final dividend in liquidation of the entire assets and business of a company and one where the payments of dividends were made by a going concern. Both of these cases relate to the act of October 3,
28 1913, which contains no definition of the term "dividend," and as pointed out in the note in Holmes Federal Taxes (1923 ed.)

and also (1925 ed.) pages 625 and 830, respectively, the question in both cases was whether earnings and profits accumulated prior to March 1, 1913, should be considered as dividends. There was no discussion at all of earnings or profits accumulated subsequent to March 1, 1913; no determination as to whether they should be considered as dividends. These cases are not authority for the proposition that a distribution, in the liquidation of a corporation, of assets accumulated subsequent to February 28, 1913, cannot be considered as a dividend under the revenue act of 1918. Congress had the right to provide what the term "dividend" as used in the act should cover and make it different from the usual understanding of the term, and that is what Congress did in section 201 (a).

If subdivisions (a) and (c) of section 201 can be construed together it should, of course, be done. One should not be permitted to defeat the other. United States v. Ninety-Nine Diamonds, 139 Fed. 961.

Does the construction of the act urged by plaintiff bring these two provisions into conflict?

The trial court pointed out in its opinion one field in which subdivision (c) could operate without conflict with subdivision (a), saying: "Gains might well accrue from the fact that the capital stock when acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore should bear not only a surtax in a proper case, but a normal tax also." Counsel for defendant in argument point out that the Hellman & Sons Fur and Wool Company had, when liquidated, a surplus of $46,466.27, of which $23,233.13 was distributed to plaintiff. Of this $15,772.79 represented his share of the earnings accumulated since February 28, 1913. If his stock had cost him par, his entire gain would have been $23,233.13, of which $15,772.79 would be attributable to the distribution of earnings accumulated since February 28, 1913, and $7,460.34 would have been profit in the liquidation within the meaning of section 201 (c). A situation would there be presented where the profit on the shares would be subject to both normal and surtax,
29 while on the part distributed of earnings accumulated since February, 1913, only the surtax would apply, and counsel for defendant claim that in this manner gains realized in liquidation of corporations would be taxed as other gains or profits. This illustration points out how the two subdivisions can be construed without fatal conflict.

A dividend is a gain or profit. Therefore the further language of subdivision (c) "any gain or profit realized thereby shall be taxed to the distributee as other gains or profits" includes dividends.

We are satisfied that subdivision (c) of section 201 is not an exception to or qualification of section 201 (a) but is supplemental thereto. Lynch v. Hornby and Lynch v. Turrish, supra, are not

authority against this view. Langstaff v. Lucas, supra, and the appeal of John E. Greenwood, a decision of the U. S. Board of Tax Appeals, are, but we are unable to agree with these decisions.

Defendant claims in his argument that the petition does not specify whether the $31,545.58 surplus of the corporation was "earned surplus," "paid-in surplus," or "appreciated value of capital assets." The petition states as to said surplus that it "consisted of earnings and profits accumulated by said corporation since February 28, 1913." We think this sufficiently describes the nature of the surplus. Plaintiff does assert that the surplus is a "gain realized in a liquidation." The important question, however, is what the surplus in fact is and not what it may be designated in the pleadings.

The question involved in this case is not easy of solution. It may fairly be considered a close one, and not free from doubt. Plausible argument can be presented for the position taken by either side to the controversy as to the construction of subdivisions (a) and (c) of section 201. That leads us to suggest that some elementary and fundamental rules of statutory interpretation ought to be applied, and if so, are controlling in a decision of this case.

It is both the English and the American rule that doubts in taxation statutes are resolved in favor of the taxpayer, and that laws imposing taxes are to be strictly construed and not extended beyond the clear import of the language used. It is the duty of taxing powers to make clear what is to be taxed and how. In
30 Gould v. Gould, 245 U. S. 151, 153, the court said: "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." Haiku Sugar Co. et al. v. Johnstone, 249 Fed. 103; Edwards v. Wabash Ry. Co., 264 Fed. 610; Hartranft v. Wiegmann, 121 U. S. 609; Eidman v. Martinez, 184 U. S. 578; United States v. Merriam, 263 U. S. 179; 2 Sutherland on Statutory Construction, vol. 2, p. 999.

There may be double taxation, but the purpose of the Congresses so to tax must be clear. As said in Tennessee v. Whitworth, 117 U. S. 129, 137: "Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall as far as is practicable be laid equally on all, and if property is taxed once in one way it would ordinarily be wrong to tax it again in another way when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition."

Courts will avoid if possible an interpretation of the statute which results in injustice. 25 R. C. L. p. 1022; Lionberger v. Rouse, 76 U. S. 468; United States v. Oregon & C. R. R., 164 U. S. 526; Knowlton v. Moore, 178 U. S. 41.

Under the contention of defendant here, if distribution of the surplus accumulated since February 28, 1913, had been made in the form of a dividend declared by the corporation the day before it was intended to liquidate and dissolve the same, it would have been a dividend and not subject to the normal tax; if distributed the next day in a final liquidation of the corporation it would be subject to the normal tax. The manner of distribution, if this position is correct, determines taxability, and not the character of the income. The statute should be clear to warrant such a conclusion which results in a double income tax, as these earnings of the corporation have already been fully taxed. Section 201 (c) does not say that the normal tax shall be assessed on distributions
31 of earnings accumulated since February 28, 1913, made by corporations in liquidation. It does not say that earnings so made shall not be considered dividends under section 201 (a). If Congress had intended that the definition of the term "dividend" in section 201 (a) should not include distribution by corporations in liquidation of earnings or profits accumulated since February 28, 1913, it would have been very easy to have said so. Shwab v. Doyle, 258 U. S. 529. That this section is not clear is shown by changes therein in the subsequent acts of Congress. The revenue act of 1921 omits the provisions as to distribution in liquidation in the 1918 act, and under its provisions the present question could not arise. We do not think this indicates an intention of Congress to change an established theory, but that it was the intention to end the injustice which the regulation of the Treasury Department brought about. We quote on this from Holmes Federal Taxes (1923 ed.), p. 630: "Congress has now definitely provided against the unfair and unwarranted practice of the Treasury Department under the 1918 law of subjecting such earnings or profits to both the normal tax and the surtax in case of the mere accident of their distribution in the liquidation of a corporation. Where a corporation distributes all of its property in complete liquidation or dissolution, the gain realized by the stockholder from the transaction is taxable as a dividend to the extent that it is paid out of the earnings or profits of the corporation accumulated since February 28, 1913. If the amount received by the stockholder in liquidation is less than the cost or other basis of the stock, a deductible loss is sustained."

While it is our opinion that the term "dividend" as used in section 201 (a) of the act of 1918 covers a distribution of a corporation to its stockholders out of earnings or profits accumulated since February 28, 1913, even if the distribution is not made until the liquidation of the corporation, and such distribution is not subject to the normal tax, if the question is to be considered as one not free of doubt, which seems to us the most that defendant can claim, then as we have before stated, that doubt should be resolved in favor of the taxpayer. A conclusion of the court along the lines urged by defendant would result in imposing taxes on plaintiff by a doubtful

construction of a taxing statute which would extend its provisions beyond the import of the language used and result in double taxation. We are not warranted in such conclusion, and while regretting to differ with the Circuit Court of Appeals of the
32 Sixth Circuit, a decision of the Board of Tax Appeals, and the regulation of the Treasury Department, we are satisfied the holding of the trial court was correct and the judgment is affirmed.

33 In United States Circuit Court of Appeals

[Title omitted.]

In error to the District Court of the United States for the Eastern District of Missouri.

Judgment

March 18, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed with costs, and that Isadore N. Hellman have and recover against Arnold J. Hellmich, collector of internal revenue for the first district of Missouri, the sum of twenty dollars for his costs herein and have execution therefor.

34 [Clerk's certificate to foregoing transcript omitted in printing.]

35 Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

O

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 300

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, ETC., PETITIONER

vs.

MILTON C. HELLMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Writ of Error.

In the District Court of the United States Within and For the Eastern Division of the Eastern Judicial District of Missouri.

Milton C. Hellman, Plaintiff,
No. 6990 vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The President of the United States, to the Honorable Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri,—Greeting:

Because, in the record and proceedings, and in the rendition of the judgment in a cause which is in the District Court, before you, at the March Term, 1925, wherein Milton C. Hellman was plaintiff and Arnold J. Hellmich, Collector, was defendant, is alleged manifest error hath happened to the injury and damage of the defendant, as by its complaint appears.

Therefore, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, we do command you that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the 8th Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the 8th Circuit on or before the 10th day of January, 1926, to the end that the records and proceedings aforesaid being inspect-
2 ed, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws of the United States should be done.

Witness, the Honorable Chas. B. Faris, Judge of the District Court of the United States within and for the Eastern District of Missouri ths 10th day of November, 1925.

Seal
U. S. Dist. Court
East. Div.
East Jud.
Dist. of Mo.

Issued at office in the City of St. Louis with the seal of the District Court and dated as aforesaid.

JAS. J. O'CONNOR,
Clerk, District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

Allowed by:
C. B. Faris,
Judge.

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3 Return To Writ.

In the District Court of the United States Within and for the Eastern Division of the Eastern Judicial District of Missouri.

Milton C. Hellman, Plaintiff,
No. 6990. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

In obedience to the command of the within and foregoing writ, I herewith transmit to the United States Circuit Court of Appeals for the 8th Circuit a duly certified transcript of the record and proceedings in the above-entitled cause, with all things concerning the same.

Seal
U. S. Dist. Court
East. Div.
East. Jud.
Dist. of Mo.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said District Court, at office in the City of St. Louis, this .... day of ....., 1925.

JAS. J. O'CONNOR, Clerk.

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4 **Citation.**

In The District Court Of The United States Within And For The Eastern Division Of The Eastern Judicial District Of Missouri.

Milton C. Hellman, Plaintiff,
No. 6990. vs.
Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, Defendant.

The United States Of America To Milton C. Hellman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In Witness Whereof, I, the undersigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this 10th day of November, in the year one thousand nine hundred and twenty-five.

C. B. FARIS,
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

HENRY H. FURTH
Attorney for Plaintiff.

5 United States of America,
Eastern Division of the Eastern
Judicial District of Missouri—ss.

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered, that heretofore, to-wit: on the 17th day of February, 1925, there was filed in the office of the Clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, a petition wherein Milton C. Hellman is Plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is Defendant, Cause No. 6690 At Law, which said petition is in words and figures as follows, to-wit:

6 (Petition.)

In the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

March Term, 1925.
Milton C. Hellman, Plaintiff,
6990-1 vs.
Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri. Defendant.

The plaintiff for his cause of action against defendant alleges as follows:

That plaintiff is a citizen of the United States and at all times hereinafter mentioned, resided and now resides in the City of St. Louis in the State of Missouri.

That the defendant was in the year 1923 and now is the duly appointed Collector of United States Internal Revenue for the First District of Missouri.

That this is a suit of a civil nature at common law, arising under the constitution and laws of the United States and under the laws of the United States pertaining to Internal Revenue.

That the plaintiff was on the 31st day of December, 1919 the owner of one half of the capital stock of Hellman & Sons Fur & Wool Company, a corporation organized and incorporated under the laws of the State of Missouri and carrying on business in the City of St. Louis as a dealer in furs and

wool; that capital was a material income-producing factor in the business of said corporation and fifty (50%) percent or more of its gross income consisted of gains and profits from trading as a principal.

That the books of account of said corporation showed that on said 31st day of December 1919 its paid-up capital stock was Twenty-seven Thousand, Six Hundred Dollars ($27,600) and its surplus was Sixty-one Thousand, Five Hun-
7 dred Sixty and 26/100 Dollars ($61,560.26); that on said day said corporation was also indebted to the United States for income tax and excess profits tax on its income for the calendar year 1919, the exact amount of which had not been ascertained and which did not appear on its books, but was later determined to be Fifteen Thousand Ninety-three and 99/100 Dollars ($15,093.99) leaving a net surplus at that time of Forty-six Thousand Four Hundred Sixty-six and 27/100 Dollars ($46,466.27) Dollars; that of said surplus at least Thirty-one Thousand, Five Hundred Forty-five and 58/100 Dollars ($31,545.58) consisted of earnings and profits accumulated by said corporation since February 28th, 1913.

That on said 31st day of December 1919 said corporation was duly dissolved and liquidated, the assets thereof were distributed to the shareholders of said corporation in accordance with their several interests therein, and they assumed the liability of said corporation to the United States for taxes on its income for 1919.

That in said liquidatiion plaintiff realized a gain of Fifteen Thousand, Four and 55/100 Dollars ($15,004.55) all of which consisted of plaintiff's share of the surplus of said corporation and was a distribution made by said corporation to its stockholders out of its earnings or profits accumulated since February 28th 1913 and as such, was taxable to plaintiff as a dividend, as dividends are defined in Section 201 (a) of the Revenue Act of 1918.

That on or before the 15th day of March 1920 plaintiff made and filed with the Collector of United States Internal Revenue for the First District of Missouri, a return of his income, gains and profits for the calendar year 1919 in the manner and [and] form prescribed by law; that plain-
8 tiff's total taxable net income for said calendar year 1919 was Twenty-five Thousand, One Hundred Fifty-

one and 68/100 ($25,151.68) derived from the following sources, to-wit:

Salary	$10,012.50
Profit from the liquidation of Hellman & Sons Fur & Wool Company,	15,004.55
Other income	220.87
Taxable interest on U. S. obligations	56.07
	$25,293.99
Less allowable deductions,	142.31
Net taxable income	$15,151.68

That under the provisions of Section 216, Subdivisions (a), (b), (c) of the Revenue Act of 1918 the plaintiff was entitled to the following credits for the purpose of the normal tax only, to-wit:

Subd. (a) The amount of the dividend, that is to say, the gain realized by him from the liquidation of Hellman & Sons Fur & Wool Company,	$15.004.55
Subd. (b) The amount received as interest on obligations of the United States and included in gross income,	56.07
Subd. (c) Personal exemption,	1,000.00
Total credits,	$16,060.62

That plaintiff's net income for the calendar year 1919 subject to normal tax was Nine Thousand, Ninety-one and 06/100 Dollars ($9,091.06) of which said income the sum of Four Thousand Dollars, ($4,000) was taxable at four (4%) percent and the remainder was taxable at eight (8%) percent; that the total normal tax due from plaintiff on his said income was Five Hundred Sixty-seven and 30/100 ($567.30); that the surtax assessable thereon was One Thousand Two Hundred Sixteen and 68/100 Dollars ($1,216.68) and the total tax due from the plaintiff on his income for the calendar year 1919 was One Thousand Seven Hundred Eighty-three and 98/100 ($1,783.98) Dollars.

That thereafter, to-wit: on or about the 30th day of July 1923, the Commissioner of Internal Revenue gave notice to plaintiff that an examination of plaintiff's income tax returns for the years 1919 and 1920 disclosed an additional tax liability on the part of plaintiff for Two Thousand, Three Hundred

Thirty-one and 58/100 Dollars ($2,331.58) for the year
9 1919 and an over assessment of One Thousand Fifty and 49/100 Dollars ($1,050.49) for the year 1920, that is to say, a net tax liability of One Thousand Two Hundred Eighty-one and 09/100 Dollars ($1,281.09) and granted plaintiff thirty (30) days within which to file an appeal and show cause why such additional tax of Two Thousand, Three Hundred Thirty-one and 58/100 Dollars ($2,331.58) for the year 1919 should not be paid.

That thereafter, to-wit: on or about the 28th day of August 1923 plaintiff admitted liability for an additional tax of One Thousand One Hundred Thirty-one and 23/100 Dollars ($1131.23) for the calendar year 1919, but denied liability for the remainder of the alleged demand, to-wit: the sum of One Thousand Two Hundred and 35/100 Dollars ($1,200.35) and appealed to the Commissioner of Internal Revenue and showed cause why said amount of One Thousand Two Hundred and 35/100 ($1,200.35) Dollars should not be paid.

That thereafter, to-wit: on or about the 4th day of January 1924 said Commissioner of Internal Revenue advised the plaintiff that his said appeal had been denied and that said additional tax of Two Thousand, Three Hundred Thirty-one and 58/100 ($2331.58) on his income for the calendar year 1919 would be assessed against him.

That the Commissioner of Internal Revenue thereuon recomputed plaintiff's tax on his income for the calendar year 1919 and reassessed the same as follows:

Said Commissioner allowed the plaintiff the following credits:

Taxable interest on U. S. Bonds	$ 56.07
Personal exemption	1,000.00
	1,056.07

But said commissioner failed and refused to allow as a credit for the purpose of the normal tax, as provided in Section
216 (a) of the Revenue Act of 1918, the sum of Fif-
10 teen Thousand Four and 55/100 Dollars ($15,004.55) the gain realized by plaintiff in the liquidation of Hellman & Sons Fur & Wool Company, but included the same in the income subject to the normal tax, although it fully appears that said gain consisted of a distribution by said corporation to its shareholders out of its earnings or profits accumulated since February 28th, 1913, and said Commis-

sioner of Internal Revenue assessed against plaintiff on his income for the calendar year 1919, including said gain of Fifteen Thousand Four and 55/100 Dollars ($15,004.55) in the liquidation of said corporation, a normal tax of One Thousand Seven Hundred Sixty-seven and 65/100 Dollars ($1,767.65) and a surtax of One Thousand, Two Hundred Sixteen and 68/100 ($1,216.68) Dollars, the total tax for said year assessed against plaintiff being, Two Thousand Nine Hundred Eighty-four and 33/100 Dollars ($2,984.33).

That thereafter, to-wit: on or about the 5th day of March 1924 defendant served notice on plaintiff of the assessment of said additional tax of Two Thousand, Three Hundred Thirty-one and 58/100 Dollars ($2,331.58) on plaintiff's income for the calendar year 1919 and of the credit of One Thousand Fifty and 49/100 Dollars ($1,050.49) the over assessment against plaintiff for the year 1920, applying the same as a credit against said additional assessment of Two Thousand Three Hundred Thirty-one and 58/100 Dollars ($2,331.58), and defendant duly demanded of plaintiff payment of the sum of One thousand, Two hundred Eighty-one and 09/100 Dollars ($1,281.09) being the amount of said additional assessment for the calendar year 1919, diminished by the amount of the over-assessment of One Thousand, Fifty and 49/100 Dollars ($1,050.49) for the calendar year 1920.

That on the 17th day of March 1924 plaintiff paid to defendant voluntarily, the sum of Eighty and 74/100 ($80.74) Dollars, the amount which plaintiff admitted to be due from him to the United States on account of balance of the tax on his income for the year 1919, and at the same time,
11 in order to avoid distraint and penalties, paid to defendant, under protest, the sum of One Thousand, Two Hundred and 35/100 ($1,200.35) Dollars the amount assessed against him by the Commissioner as additional tax on his income for 1919, for which liability is denied by plaintiff.

That thereafter, to-wit: on or about the 4th day of June 1924 plaintiff filed a claim with the Commissioner of Internal Revenue for the refund of said sum of One Thousand, Two Hundred and 35/100 Dollars ($1,200.35.) so paid by plaintiff under protest.

That on or about the 12th day of November 1924 plaintiff was advised by said Commissioner of Internal Revenue, that his said claim for refund had been denied by said Commissioner of Internal Revenue.

That inasmuch as said gain of Fifteen Thousand, Four and 55/100 Dollars ($15,004.55) realized by plaintiff in the liquidation of the aforesaid corporation, said Hellman & Sons Fur & Wool Company, and returned by plaintiff as part of his income for the calendar year 1919 was a distribution made by said corporation to its shareholders out of earnings and profits accumulated by it since February 28th, 1913, said gain constituted a dividend as defined in Section 201 (a) of the Revenue Act of 1918 and was not subject to the normal income tax; and that the normal tax at the rate of eight (8%) percent assessed thereon was improperly and illegally assessed against the plaintiff and the collection of said tax from the plaintiff by the defendant was improper and illegal. and the plaintiff is entitled to recover the same.

Wherefore, plaintiff demands judgment against the defendant in the sum of Twelve Hundred and 35/100 ($1200.35) Dollars with interest thereon at the rate of six (6%) percent per annum from the 17th day of March 1924 together with the costs and disbursements of this action.

(Signed) HENRY H. FURTH.
Attorney for Plaintiff.
720 Rialto Building.

12 State of Missouri,
City of St. Louis.—ss.

Milton C. Hellman, the plaintiff herein, being first sworn according to law, makes oath and says that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

(Signed) MILTON C. HELLMAN

Subscribed and sworn to before me this 13th day of February 1925. My Commission expires Feb. 10, 1929.

(Signed) L. C. DIETRICH
(Seal) Notary Public.

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13 (Demurrer of Defendant to Petition.)

(Filed March 23, 1925).

Comes now Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the defendant in the above styled cause, by his attorney, Claude M.

Crooks, Assistant United States Attorney, and demurs to the petition herein, for the reason that the said petition does not state a cause of action against this defendant upon which this plaintiff can recover.

(Signed) CLAUDE M. CROOKS

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14 (Order of Submission of Demurrer to Petition.)

June 1, 1925.

Now on this day comes plaintiff by his attorney and comes also defendant by the United States District Attorney for the Eastern Judicial District of Missouri; whereupon the demurrer of the defendant to the petition of plaintiff is by agreement of parties submitted to the Court on briefs to be hereafter presented.

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15 (Order overruling Demurrer to Petition.)

July 7, 1925.

Now on this day the Court having considered the demurrer of defendant to the petition of plaintiff herein, being fully advised in the premises, doth Order that said demurrer of defendant be, and it is hereby, overruled. (Oral Opinion.)

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16 (Record entry of filing of Opinion and overruling Demurrer to Petition.)

July 10, 1925.

Now on this day there is received and filed herein memo of oral, opinion of Court on demurrer of defendant to petition.

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17 Memorandum of Oral Opinion of the Court.

This case was submitted to the Court some days since on a demurrer of the defendant to the petition of plaintiff.

Plaintiff sues defendant, as the Collector of Internal Revenue for the First District of Missouri, to recover the sum of $1,200.35 paid by him under protest, as a normal income tax on the sum of $15,004.55, derived, as the petition alleges, from plaintiff's one-half share in the surplus and profits of the Hellman & Sons Fur & Wool Company, which surplus and profits had accumulated since February 28th, 1913.

The above-named Company went into voluntary liquidation on the thirty-first day of December, 1919, and the capital stock, presumably, and the said surplus and profits, as it is alleged, were distributed among the plaintiff and one other, who, it seems, constituted all of the stockholders of this corporation.

When the above Company was liquidated it had a capital stock of $27,600.00, held, as already said, and surplus and profits of $61,560.26. This latter sum of surplus and profits was, it seems, ultimately reduced to the sum of $30,009.60, by deductions and exemptions of a sort not pertinent to this inquiry. The sum which remains thereupon was divided between plaintiff and another, each of whom took one-half as each, as said, had theretofore held one-half of the capital stock of the liquidating company. I am dealing here, so far as the petition is concerned (by which alone I am bound, and with which alone I am concerned) with the surplus and profits accruing since February 28th, 1913. What became of the capital stock does not appear, nor is it in issue or pertinent, so far as the petition is concerned.

18 To the plaintiff's petition, setting forth, in effect, the facts above stated, defendant demurs generally, for that the petition does not state facts sufficient to constitute a cause of action against the defendant. The briefs on both sides concede, that the single question is whether said sum of $15,004.55 was, or was not, subject to the normal tax of eight per cent., which is taxable by law as ordinary income.

The plaintiff contends that it was not so subject; the defendant contends contra. Both sides agree that the question mooted is to be solved by a determination of whether the sum of $15,004.55, tax on which is in dispute, fell under the provisions of subdivision (a) of Section 201 of the Revenue Act of 1918, or whether it fell under the provisions of subdivision (c) of said Section 201.

Plaintiff says that under the pleaded facts he is to be taxed under the provisions of subdivision (a) of the above section, while defendant contends that he falls within the purview of subdivision (c) of said section. Upon these opposite contentions both sides agree that the case turns.

So, it is obvious, without any further consideration of the law or of the statutes, that a decision of this mooted point will decide this case.

Skelitonized, so as sharply to present the point mooted, subdivision (a) of section 201, supra, says:

"Sec. 201. (a) That the term 'dividend' when used in this title **** means (1) any distribution made by a corporation **** to its shareholders or members, whether in cash, or in property, or in stock of the corporation, out of its earnings or profits accumulated," since February 28, 1913.

Now, while it is also pleaded that the corporation was dissolved and liquidated on December 31, 1919, it is fur-
19 ther pleaded that the sum of $15,004.55, tax on which is in dispute was distributed to plaintiff out of the net surplus and profits which had accumulated since February 28, 1913. The distribution, as far as the value of the capital stock of $27,600.00 is concerned, is not disclosed and, as already forecast, such stock is only mentioned incidentally, and as a part of the history of the case, and the question of what became of it is not in controversy here.

Upon these pleaded facts defendant contends that subdivision (c) of Section 201 applies. This subdivision provides:

"(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or stock distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

From a reading of this subdivision it is clear that the case as pleaded does not fall into the category of the first sentence of subdivision (c), because the payment here was not made in stock, issued to the amount of the surplus and earnings accumulated.

The second sentence of subdivision (c) of Section 201, supra, says that

"Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

It will be noted therefore, that upon the face of subdivision (a) of section 201, supra, plaintiff falls precisely within its terms. The statute says "any distribution" shall constitute a dividend. A dividend is subject to a surtax, but not to a normal tax, as was here collected. This is so for the reason

that such a dividend has already been charged with a normal tax at its source, and so ought not to be so charged a second time, but ought of course, to be charged against the tax payer for the purpose of levying thereon a surtax as provided by statute.

I am of the view that subdivision (c) of section 201 is merely supplemental to subdivision (a) of said section. Gains might well accrue from the fact that the capital stock when acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore, should bear not only a surtax in a proper case, but a normal tax also.

The words "realized thereby", as used in subdivision (c) supra, mean realized by the process or transaction of payment in exchange for stock or shares.

I have, correctly, I think, already eliminated the first sentence of this subdivision as inapplicable to the case as pleaded, and it will be observed that the last sentence of subdivision (c), supra, says nothing as to surplus or profits accumulated and distributed at the same time as capital is distributed.

This, I think, is taken care of by the provisions of subdivision (a) supra, even in a case of liquidation, wherein the surplus and profits accumulated since February 28, 1913, are involved and were distributed.

So construed, as supplemental to each other, well-known legal and objectionable evils are avoided, and a definite field, in no wise conflicting, is found for the operation and application of both subdivisions. Otherwise construed those provisions seem in hopeless conflict with each other.

The word "any", as used in subdivision (a) supra, is a broad term. It may well embrace distribution of surplus and profits accruing since February 28th, 1913, even though such surplus and profits are distributed upon final liquidation of the Company in which they accrue.

Moreover, subdivision (c) supra, does not in terms preclude this view; it merely says "other gains and profits." A dividend is a gain and a profit, and so a dividend is included in the term "gains and profits", and is made taxable, not as

income, however, but as a dividend; that is, it is subject to the surtax only, and not to a normal tax.

No taxing statute ought, if it can be avoided, to be so construed as to levy a double income tax on identically the same money, and unless there is a plain, unambiguous statute so warranting, no tax ought to be exacted, or can be exacted. This latter rule is well settled. The former rule mentioned is a well known rule of construction.

It is fundamental, that a court is ordinarily not bound by the construction put upon the statute by the Commissioner of Internal Revenue. If such Commissioner construes a statute correctly, well and good; if he construes it erroneously, then the courts alone are saddled with the duty of authoritatively deciding what a statute means.

No regulation by the Treasury Department, which has the effect to bring one not required by statute to pay a tax within the purview of such a statute, can stand; and, while it is regrettable that I cannot agree with the Department's construction of these statutes, which is wholly in conflict with these views, plain rules of statutory construction have been, in my opinion, violated by the departmental view and by departmental regulation in attempting to construe the two statues here dealt with in the expression of these views.

As forecast, I think I can see a field wherein subdivi-
22 sion (c) of Section 201 supra, may well operate, without the necessity of holding it in conflict with subdivision (a) of said section. This field, or one of the fields, at least, I have attempted to point out; there may be others. When this view is taken of it, the situation does not present one of double taxation, and the construction intended by Congress is rendered unambiguous. I am constrained to think that the view taken by the Treasury Department, as expressed in the Regulation under discussion, has the effect to doubly tax a single fund, and has the effect to exact a tax upon a section wholly ambiguous, and ambiguous to the extent that no valid tax can be collected thereunder.

I think the demurrer should be overruled, and so it is ordered.

(Order overruling Demurrer, etc.)

Milton C. Hellman, Plaintiff,
No. 6990-1. vs.
Arnold J. Hellmich, Collector, Defendant.

The demurrer in this case will be overruled, for the reasons given in case No. 6989.

These two cases are companion cases; what is said in one is wholly applicable to the other.

St. Louis, Missouri, July 7, 1925.

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23 (Judgment, September 12, 1925.)

Now on this day comes plaintiff in the above entitled cause by his attorney and comes also defendant by the United States District Attorney for the Eastern Judicial District of Missouri, and it appearing to the Court that Defendant heretofore filed herein his demurrer to the petition of plaintiff, which demurrer was overruled, and defendant now in open Court through said United States District Attorney declining to plead further herein, it is, therefore, on motion of said plaintiff by his attorney Ordered that judgment be entered herein in favor of plaintiff and against defendant in the sum of Twelve Hundred Dollars and Thirty-five Cents ($1200.35), together with interest thereon at the rate of six percent per annum from May 1st, 1924, to date, such interest amounting to the sum of Ninety-eight Dollars and Eighty-three Cents ($98.83), making an aggregate finding and award of judgment in favor of plaintiff and against defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18);

It is, therefore, pursuant to action of defendant and finding and award of the Court as aforesaid, Ordered and Adjudged that plaintiff, Milton C. Hellman, have and recover [—] defendant, Arnold J. Hellmich, Collector of the United States Revenue for the First District of Missouri, the sum of Twelve Hundred Dollars and Thirty-five Cents ($1200.35), together with interest thereon at the rate of six percent per annum from May 1st, 1924, to date, such interest amounting to the sum of Ninety-eight Dollars and Eighty-three Cents ($98.83) making an aggregate judgment in favor of said plaintiff and against said defendant in the sum of Twelve Hundred Ninety-nine Dollars and Eighteen Cents ($1299.18) and that plain-

tiff also recover of defendant his costs and charges herein expended.

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24 Order for Enlarging Time for Filing Bill of Exceptions.

September 18, 1925.

Comes now Allen Curry, United States Attorney for the Eastern Division of the Eastern Judicial District of Missouri, on behalf of the above styled defendant, Arnold J. Hellmich, Collector, and makes application for an order extending the time for filing of the Bill of Exceptions herein, and cause being shown therefor, and such application is granted and the time for the filing of the Bill of Exceptions of the above named defendant is extended for sixty days from and after September 18, 1925.

(Signed) C. B. FARIS, Judge.

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25 (Record entry of filing of Petition for Writ of Error, etc.)

November 10, 1925.

Now on this day comes defendant in the above entitled cause and files herein his petition praying for the allowance of a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, together with his assignment of errors on such proposed writ of error, upon consideration whereof the Court doth Order that a writ of error be, and is hereby, allowed defendant as prayed. And now a citation is issued to plaintiff, citing and admonishing him to be and appear in said United States Circuit Court of Appeals within sixty days from and after this date, which citation is duly filed.

And now defendant files herein his praecipe for transcript on such writ of error, as well as election as to the printing of such transcript.

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26 Petition for Writ of Error.

Filed November 10, 1925.

Now comes the above named Plaintiff, Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, and shows to the Court that on the 14th day of Sep-

tember, 1925 in this Court a final judgment was rendered in the above entitled cause in favor of the plaintiff, and defendant avers that in the record and proceedings had in said cause and also in the rendition of said judgment therein, certain errors were committed to the prejudice and injury of the defendant, all of which appear in detail in defendant's assignment of errors, which is filed in this cause with this Petition for Writ of Error.

Wherefore, defendant prays that a writ of error may issue in his behalf returnable to the United States Circuit Court of Appeals for the Eighth Circuit, for the correction of the error so complained of, and for the reversal of judgment entered in said cause; that a citation be issued by the Court directed to the plaintiff and that a transcript of record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals, and for such further orders as may be proper in the premises.

(Signed) CLAUDE M. CROOKS,
Assistant United States Attorney,
Attorney for Defendant.

To the Clerk of this Court:

The above petition is granted, let the writ issue as prayed.

(Signed) C. B. FARIS
Judge.

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27 Assignment of Errors.

Filed November 10, 1925.

Now comes the defendant in the above entitled cause and presents to the Court his assignment of errors, which he alleges were committed in the record and proceedings had in said cause, and also in the rendition of said judgment in the above cause, to his prejudice and injury as follows:

I.

In overruling defendant's demurrer to plaintiff's petition.

Wherefore, because of the error herein above assigned, defendant prays that the judgment entered by the District Court in the above cause be reversed and set aside.

(Signed) CLAUDE M. CROOKS
Assistant United States Attorney,
Attorney for Defendant.

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28 (Copy of Citation and Acknowledgment of Service.)

The United States of America to Milton C. Hellman, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, Eighth Circuit, at St. Louis, Missouri, sixty days from and after the date this citation bears, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, wherein Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

In Witness Whereof, I, the undersigned Judge of the District Court of the United States for the Eastern District of Missouri have hereunto signed my name this....day of November, in the year one thousand nine hundred and twenty-five.

(Signed) C. B. FARIS
United States District Judge.

Service of the above citation is hereby acknowledged this 10th day of November, 1925.

(Signed) HENRY H. FURTH
Attorney for Plaintiff.

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29 Praecipe for Transcript and Election as to Printing.

Filed November 10, 1925.

To James J. O'Connor,
Clerk, United States District Court.

You are hereby notified that the defendant in the above entitled cause, in which a Writ of Error has been issued to the United States Circuit Court of Appeals for the 8th Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to-wit:

1. Petition.

2. Demurrer.

3. Memorandum of Oral Oponion of Court on Demurrer.

4. Record entries of Judgment.

5. Order granting Writ of Error.

6. Order granting time to file Bill of Exceptions.

7. Order showing filing of same.

8. Petition for Writ of Errors.

9. Assignment of Errors.

10. Writ of error and your return to same.

11. Citation.

12. Praecipe for transcript and certificate of Clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the Clerk of said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals said transcript here requested, in accordance with the rules of said Court of Appeals.

(Signed) CLAUDE M. CROOKS,
Attorney for Defendant.

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30 (Clerk's Certificate to Transcript)

I, Jas. J. O'Connor, Clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, Do Hereby Certify, that the foregoing is a full, true and complete transcript of the record and proceedings in Cause No. 6990, At Law, wherein Milton C. Hellman is plaintiff, and Arnold J. Hellmich, Collector of Internal Revenue for the First Internal Revenue District of Missouri is defendant (except insofar as the same is restricted by the praecipe for transcript heretofore set out) as fully as the same remains on file and of record in my office,

and that the original Citation and Writ of Error are hereto attached and herewith returned.

Seal of the U. S. Dist. Court Eastern Div. Eastern Dist. of Missouri.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Court at Office in the City of St. Louis, in the Eastern Division of said District, this 9th day of January, in the year of our Lord, one thousand, nine hundred and twenty-six.

JAS. J. O'CONNOR
Clerk of said Court
By Joseph T. Spelman
Deputy.

Filed Jan. 9, 1926. E. E. Koch Clerk.

[Appearances of counsel; omitted in printing.]
[Minute entry of argument and submission, December 22, 1926; omitted in printing.]

24 In United States Circuit Court of Appeals, Eighth Circuit

No. 7299.—December Term, A. D. 1926

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., plaintiff in error vs. MILTON C. HELLMAN, DEFENDANT IN ERROR	In error to the District Court of the United States for the Eastern District of Missouri.

Mr. John R. Wheeler, special attorney, Bureau of Internal Revenue (Mr. Louis H. Breuer, United States attorney, Mr. Claude M. Crooks, assistant United States attorney, and Mr. A. W. Gregg, general counsel, Bureau of Internal Revenue, were with him on the brief), for plaintiff in error; Mr. Henry H. Furth, for defendant in error.

Before KENYON, *Circuit Judge*, and MOLYNEAUX and OTIS, *District Judges*

Opinion filed

March 18, 1927

KENYON, *Circuit Judge:*
The same question is involved in this case as in No. 7298, Arnold J. Hellmich, collector, etc., v. Isadore N. Hellman (opinion this day filed). In accordance with the decision in that case the judgment in this is *affirmed.*
Filed March 18, 1927.

25 In United States Circuit Court of Appeals

[Title omitted.]
In error to the District Court of the United States for the Eastern District of Missouri.

Judgment

March 18, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.
On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court, in this cause,

be, and the same is hereby, affirmed with costs, and that Milton C. Hellman have and recover against Arnold J. Hellmich, collector of internal revenue for the First District of Missouri, the sum of twenty dollars for his costs herein and have execution therefor.

26 United States Circuit Court of Appeals, Eighth Circuit

Clerk's certificate

[Clerk's certificate to foregoing transcript omitted in printing.]

27 Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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50411—27

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. —

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., petitioner

v.

ISADORE N. HELLMAN

No. —

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., petitioner

v.

MILTON C. HELLMAN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of Arnold J. Hellmich, Collector of Internal Revenue for the First District of Missouri, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Eighth Circuit entered in the above-entitled cases on March 18, 1927 (*Isadore*

N. Hellman case, R. 28; *Milton C. Hellman case,* R. 23), affirming the judgments of the District Court for the Eastern District of Missouri (*Isadore N. Hellman case,* R. 14; *Milton C. Hellman case,* R. 15).

STATEMENT

The question in this case is whether under the Revenue Act of 1918, that part of a liquidating distribution of the assets of a dissolved corporation which represented earnings since February 28, 1913, was a dividend exempt from the normal tax, or whether all amounts distributed in the liquidation whether or not out of earnings accumulated since February 28, 1913, were to be treated as payments in exchange for the stock, and by comparison with the cost of the stock, gain or loss computed accordingly.

Section 201(a) of the Revenue Act of 1918, defined a dividend as "any distribution made by a corporation * * * out of its earnings or profits accumulated since February 28, 1913," and Section 216 (a) provided that "the amount received as dividends from a corporation which is taxable * * * upon its net income" were exempt from normal tax. On the other hand, subdivision(c) of Section 201 provided that "amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits." The distributions involved

in this case resulted entirely from the liquidation and dissolution of the corporation, but in part represented profits accumulated since February 28, 1913, and the question is whether they were exempt from normal tax and subject only to surtax.

Mutatis mutandis, the facts in these cases are the same. Each respondent on December 31, 1919, owned one-half of the outstanding capital stock of Hellman & Sons Fur and Wool Company, a Missouri corporation. On that date the corporation had a net surplus of $46,466.27, of which amount $31,545.58 consisted of earnings and profits accumulated since February 28, 1913. On December 31, 1919, this corporation dissolved and liquidated its entire assets, which were distributed to its two stockholders in exchange for the stock held by them. By such liquidation each of the respondents realized a gain of $15,004.55 over and above the cost or March 1, 1913, value of the stock owned by him. Neither respondent included in income taxes paid by him for 1919 any normal tax on this gain. Upon audit of their returns the Commissioner of Internal Revenue determined that normal taxes should have been paid thereon. Accordingly additional taxes were assessed against each respondent, paid under protest, and separate actions brought in the United States District Court for the Eastern District of Missouri for the recovery in each case of $1,200.35, with interest, said sum representing the amount of the additional tax

less certain overassessments. (Both cases, R. 4–9.)

The District Court gave judgment for the respondents (*Isadore N. Hellman case,* R 14; *Milton C. Hellman case,* R. 15) on the ground that the $15,004.55 gain was a dividend in the taxpayer's hands and therefore under Section 216(a) of the Revenue Act of 1918, *supra,* not subject to normal tax. Upon writs of error these judgments were affirmed by the Circuit Court of Appeals for the Eighth Circuit. (*Isadore N. Hellman case,* R. 28; *Milton C. Hellman case,* R. 23.)

ASSIGNMENT OF ERROR

The courts below erred in failing to hold that under Section 201 of the Revenue Act of 1918 the gain resulting from the distribution of the assets of a corporation in liquidation is subject to the normal tax, and in holding that to the extent such a liquidating distribution was made out of profits accumulated since February 28, 1913, it constituted a "dividend" exempt from normal tax.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals is directly in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas,* 13 F. (2d) 1022; certiorari denied October 11, 1926. (47 Sup. Ct. 111.)

2. The decision is contrary to the decision of the Board of Tax Appeals in *Appeal of John K.*

Greenwood, 1 B. T. A. 291, and the regulations of the Treasury Department in force for the last seven years.

3. A decision by this Court is necessary in order that the law may be consistently and uniformly administered by the Treasury Department in similar cases now pending or arising in the future.

For these reasons it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals in these cases should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the Eighth Circuit (*Isadore N. Hellman case,* R. 21; *Milton C. Hellman case,* R. 22) are reported in 18 Fed. (2d) 239, 244. Those of the United States District Court for the Eastern District of Missouri (Both cases, R. 10) were not reported.

JURISDICTION

The judgments of the Circuit Court of Appeals sought to be reviewed were entered on March 18, 1927. (*Isadore N. Hellman case,* R. 28; *Milton C. Hellman case,* R. 23.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question in each of these cases is whether the gains resulting from the distribution of the assets of a dissolved corporation are subject to the normal tax under Section 201 of the Revenue Act of 1918 or are exempt as a dividend within the meaning of Section 216(a) of that Act, because made out of profits accumulated since February 28, 1913.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918 (c. 18, 40 Stat. 1057) are as follows (pp. 1059, 1062, 1069, 1143):

> SEC. 201. (a) That the term "dividend" when used in this title * * * means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since February 28, 1913 * * *.
>
> * * * * *
>
> (c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.
>
> SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Reve-

nue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

(a) For the calendar year 1918 * * *;

(b) For each calendar year thereafter, 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided,* That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum.

SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by Act of Congress * * *.

SEC. 1309. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Article 1548 of Treasury Regulations 45 (1920 edition), as amended by Treasury Decision 3206 (T. D. (Int. Rev.), Vol. 23, pp. 763, 769), provides as follows:

Distribution in liquidation.—So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

STATEMENT

The facts in the cases, together with the assignment of error, are set forth in the petition.

ARGUMENT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE INSTANT CASES IS DIRECTLY IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT IN LANGSTAFF V. LUCAS, 13 F. (2D) 1022, WHICH CASE CORRECTLY HOLDS THAT THE AMOUNTS DISTRIBUTED IN LIQUIDATION OF A CORPORATION ARE NOT DIVIDENDS WITHIN THE MEANING OF THE REVENUE ACT OF 1918, AND, TO THE EXTENT OF THE GAIN RECEIVED, ARE SUBJECT TO NORMAL TAXES

The Government contends that the correct principle for the solution of the question in the cases at bar is to be found in *Langstaff* v. *Lucas,* 9 F. (2d) 691 (D. C. W. D. Ky.); affirmed, 13 F. (2d) 1022 (C. C. A. 6th); certiorari denied, 47 Sup Ct. 111. That case was based upon facts similar to those in the cases at bar, presented the same question, and involved the same sections of the Revenue Act of 1918. In the *Langstaff case* the District Court, after pointing out that this Court in *Lynch* v. *Hornby,* 247 U. S. 339, in another connection, had drawn a distinction between a dividend and a distribution in complete liquidation of a corporation, goes on to say in part (p. 694):

> Loosely speaking, the distribution to the stockholders of a corporation's assets, upon liquidation, might be termed a dividend; but this is not what is generally meant and understood by that word. As generally understood and used, a dividend is a return upon the stock of its stockholders, paid to them by

> a going corporation without reducing their stockholdings, leaving them in a position to enjoy future returns upon the same stock. * * * In other words, it is earnings paid to him [the individual stockholder] by the corporation upon his invested capital therein, without wiping out his capital. On the other hand, when a solvent corporation dissolves and liquidates, it distributes to its stockholders, not only any earnings it may have on hand, but it also pays to them their invested capital, namely, the amount which they had paid in for their stock, thus wiping out their interest in the company. As heretofore suggested, the corporation in effect buys up and retires all of its outstanding stock.

After setting out subdivisions (a) and (c) of Section 201 of the Revenue Act of 1918, *supra,* the court continues (p. 694):

> This section strips distributions made to stockholders in liquidation of a corporation of all disguises and declares that they shall be considered for what they in effect are—purchases of all their outstanding stock by the liquidating corporations, and not dividends as generally understood, and as defined in section 201, subsection (a), and as used in section 216. So construed, subsection (c) of section 201 puts the stockholder who holds his stock up to the time of liquidation, and then in effect sells it to the corporation, upon exactly the same footing as the stockholder who sells his stock to another

> during the operating life of the corporation. The latter unquestionably, under the act of 1918, was required to pay both the normal and surtax upon any profit realized by him in the transaction. That is all the former was required to do under the act as here construed.
>
> For the reasons stated, the court is forced to the conclusion that it was not intended by Congress that so-called liquidating dividends, to the extent of the profit received, should escape the normal tax.

In affirming the above decision of the District Court the Circuit Court of Appeals for the Sixth Circuit says (13 F. (2d) 1022):

> PER CURIAM. After considering carefully the reasons urged against it, we feel satisfied to affirm the judgment, and we do so upon the reasoning and conclusions of the District Judge. Although the half interest in the corporate assets which came to Langstaff was within the broad definition of "dividend" in section 201(a) * * * yet the transaction was the very one specifically provided for in the last sentence of section 201(c), and the half interest became the proceeds of the sale of Langstaff's stock in the corporation, instead of a corporate dividend. Only so can the sections be effectively read together.

Petition for certiorari in the *Langstaff case* was denied October 11, 1926. (47 Sup. Ct. 111.)

The same position is also adopted by the Board of Tax Appeals in *Appeal of John K. Greenwood,*

1 B. T. A. 291, and it is submitted that it correctly interprets the law.

As the court below said:

> Plausible argument can be presented for the position taken by either side to the controversy as to the construction of subdivisions (a) and (c) of section 201.

The court below then applied the rule that doubts are to be resolved in favor of the taxpayer.

There is another rule to be taken into account and that is the effect of administrative construction. For seven years there have been regulations of the Treasury Department in effect construing these sections. The construction adopted by the Treasury has been uniformly applied to all cases arising during that period. This is the first case in which the position of the Treasury Department has been rejected by a court. Whatever doubt there might be as to the meaning of the law and as to the decision if the question were a new one, it is a most appropriate case in which to follow an administrative construction.

The Circuit Court of Appeals in the instant cases states that the *Langstaff case, supra,* and the *Greenwood appeal, supra,* are authorities against the view taken by it, but says (*Isadore N. Hellman case,* R. 26) it is "unable to agree with these decisions."

CONCLUSION

It is important that this Court settle the conflict of opinion on the question here involved which has

arisen between the Circuit Court of Appeals for the Eighth Circuit in the instant cases and the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas, supra,* in order that there may be a uniform rule for the guidance of the Treasury Department in administering the law. It is respectfully submitted, therefore, that the petition for writs of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
SEWALL KEY,
Attorney.

JUNE, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

Nos. 299 and 300

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., Petitioner

v.

ISADORE N. HELLMAN

ARNOLD J. HELLMICH, COLLECTOR OF INTERNAL REVENUE, etc., Petitioner

v.

MILTON C. HELLMAN

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinions of the Circuit Court of Appeals for the Eighth Circuit (both cases, R. 21) are reported in 18 F. (2d) 239, 244. Those of the United States District Court for the Eastern District of Missouri (both cases, R. 10) were not reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 18, 1927. (*Isadore N. Hellman case*, R. 28; *Milton C. Hellman case*, R. 21.) Petition for writs of certiorari was filed June 14, 1927, and granted October 17, 1927, under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question in each of these cases is whether the gains resulting from the distribution of the assets of a dissolved corporation are subject both to normal tax and surtax under Section 201 of the Revenue Act of 1918 or are exempt from normal tax as a dividend within the meaning of Section 216(a) of that Act, because made out of profits accumulated since February 28, 1913, and therefore subject only to surtax.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918 (c. 18, 40 Stat. 1057) are as follows (pp. 1059, 1062, 1069, 1143):

> SEC. 201. (a) That the term "dividend" when used in this title * * * means (1) any distribution made by a corporation, other than a personal service corporation, to its shareholders or members, whether in cash or in other property or in stock of the corporation, out of its earnings or profits accumulated since February 28, 1913 * * *.
>
> * * * * *

(c) A dividend paid in stock of the corporation shall be considered income to the amount of the earnings or profits distributed. Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits.

SEC. 210. That, in lieu of the taxes imposed by subdivision (a) of section 1 of the Revenue Act of 1916 and by section 1 of the Revenue Act of 1917, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax at the following rates:

(a) For the calendar year 1918 * * *;

(b) For each calendar year thereafter, 8 per centum of the amount of the net income in excess of the credits provided in section 216: *Provided*, That in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 4 per centum.

SEC. 216. That for the purpose of the normal tax only there shall be allowed the following credits:

(a) The amount received as dividends from a corporation which is taxable under this title upon its net income, and amounts received as dividends from a personal service corporation out of earnings or profits upon which income tax has been imposed by Act of Congress * * *.

> SEC. 1309. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.

Article 1548 of Treasury Regulations 45 (1919 edition), promulgated April 17, 1919, within two months after the date of the passage of the Revenue Act of 1918, provided:

> *Distribution in liquidation.* — So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payments for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder, or over its fair market value as of March 1, 1913, if acquired prior thereto, is a taxable profit. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

This Article was amended in the 1920 edition of Treasury Regulations 45 by Treasury Decision 3206 (T. D., Int. Rev., Vol. 23, pp. 763, 769), to read as follows:

Distribution in liquidation.—So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payment for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock.

The regulation since then has remained unchanged and is still in effect so far as distributions in liquidation under the 1918 Act are concerned.

STATEMENT

Mutatis mutandis the facts in these two cases are the same. Each respondent on December 31, 1919,

owned one-half of the outstanding capital stock of Hellman & Sons Fur & Wool Company, a Missouri corporation. On that date the corporation voluntarily dissolved and liquidated its entire assets, which were distributed to its two stockholders in exchange for the stock held by them. At the time of liquidation the corporation had a net surplus of $46,466.27, of which amount $31,545.58 consisted of earnings and profits accumulated since February 28, 1913. By such liquidation each respondent realized a gain of $15,004.55 over and above the cost or March 1, 1913, value of the stock owned by him. (Both cases, R. 4–5.)

Neither respondent included in income taxes paid by him for the year 1919 any normal tax on said gain (both cases, R. 5–7), on the theory that it constituted a dividend within the meaning of Section 201 (a) of the Revenue Act of 1918, *supra*, which defines a dividend as "any distribution made by a corporation * * * out of its earnings or profits accumulated since February 28, 1913"; and that as such it is exempt from normal tax by Section 216(a), which provides that "the amount received as dividends from a corporation which is taxable * * * upon its net income" should be allowed as a credit for the purpose of the normal tax. (Both cases, R. 8–9.) Upon audit of respondents' returns, however, the Commissioner of Internal Revenue determined that the gain resulting from the distribution in liquidation of the assets of the corporation was subject to normal taxes under

Section 201(c) of the Revenue Act of 1918, *supra,* which provides that "amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the distributee as other gains or profits." Accordingly, additional taxes were assessed against each respondent, paid under protest, and separate actions brought in the United States District Court for the Eastern District of Missouri for the recovery in each case of $1,200.35, with interest, said sum representing the amount of the additional taxes less certain overassessments. (Both cases, R. 7–9.)

The District Court gave judgment for the respondents. (*Isadore N. Hellman case,* R. 14; *Milton C. Hellman case,* R. 15.) Upon writs of error these judgments were affirmed by the Circuit Court of Appeals for the Eighth Circuit. (*Isadore N. Hellman case,* R. 28; *Milton C. Hellman case,* R. 21.)

ASSIGNMENT OF ERROR

The courts below erred in holding that under Section 201 of the Revenue Act of 1918, *supra,* the gain resulting from the distribution of the assets of a corporation in liquidation is not subject to the normal tax, and in holding that to the extent that such a liquidating distribution was made out of profits accumulated since February 28, 1913, it constituted a "dividend" exempt from normal tax.

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SUMMARY OF ARGUMENT

The decision of the Circuit Court of Appeals in the instant cases is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas,* 13 F. (2d) 1022; certiorari denied, 273 U. S. 721. The Government contends that the correct solution of the question presented is to be found in the *Langstaff case.* That decision not only accords with long-established and uniform administrative construction, but is also supported by the subsequent legislative history of the law. Double taxation is not involved, nor is there any greater hardship upon taxpayers than is necessarily incident to an income tax. Whatever doubt there might be as to the construction of the statute if the question were a new one should be resolved in favor of the Government, in view of the legislative history of Section 201 of the law and the fact that this is the first case in which its interpretation by the Treasury Department has been rejected during the period of nearly nine years which has elapsed since its enactment.

ARGUMENT

A DISTRIBUTION IN LIQUIDATION OF THE ASSETS OF A CORPORATION, WHETHER OR NOT ACCUMULATED SINCE FEBRUARY 28, 1913, IS NOT A DIVIDEND WITHIN THE MEANING OF THE REVENUE ACT OF 1918, AND, TO THE EXTENT OF THE RESULTING GAIN, IS SUBJECT TO THE NORMAL TAX

On the question here involved there is a direct conflict of opinion between the Circuit Court of

Appeals for the Eighth Circuit and the Circuit Court of Appeals for the Sixth Circuit. In the instant cases the Circuit Court of Appeals for the Eighth Circuit holds that under Section 201(a) of the Revenue Act of 1918, *supra,* that part of a liquidating distribution of the assets of a dissolved corporation which represents earnings since February 28, 1913, is a dividend and as such exempt from normal taxes under Section 216(a) of the same Act, *supra.* On the other hand, in *Langstaff* v. *Lucas,* 13 F. (2d) 1022, certiorari denied, 273 U. S. 721, which case was based upon facts similar to those in the cases at bar, presented the same question and involved the same sections of the Revenue Act of 1918, the Circuit Court of Appeals for the Sixth Circuit held that amounts distributed in the liquidation of a corporation are not dividends within the meaning of Section 201(a), but are to be treated under Section 201(c) as payments in exchange for stock and therefore subject to the normal tax. The latter case seems to present the better reasoning and accords with the unchallenged practice of the Government for nearly nine years.

The views of the Government can not be better expressed than by quoting the following language of the District Court in the *Langstaff case* (9 F. (2d) 691, 694):

> Loosely speaking, the distribution to the stockholders of a corporation's assets, upon liquidation, might be termed a dividend; but this is not what is generally meant and

understood by that word. As generally understood and used, a dividend is a return upon the stock of its stockholders, paid to them by a going corporation without reducing their stockholdings, leaving them in a position to enjoy future returns upon the same stock. Mr. Justice Pitney, in the case of *Lynch* v. *Hornby,* 247 U. S. 339, * * * in defining the word "dividend," as used in the act of 1913, which did not undertake to define the word, gives a good definition of the word as generally understood and used: "In short, the word 'dividends' was employed in the act as descriptive of one kind of gain to the individual stockholder; dividends being treated as the tangible and recurrent returns upon his stock, analogous to the interest and rent received upon other forms of invested capital." In other words, it is earnings paid to him by the corporation upon his invested capital therein, without wiping out his capital. On the other hand, when a solvent corporation dissolves and liquidates, it distributes to its stockholders, not only any earnings it may have on hand, but it also pays to them their invested capital, namely, the amount which they had paid in for their stock, thus wiping out their interest in the company. As heretofore suggested, the corporation in effect buys up and retires all of its outstanding stock.

An examination of section 201 of the act discloses that Congress had clearly in mind the distinction between a dividend, as generally understood, and a distribution in

liquidation, and intended to preserve this distinction. * * *

This section strips distributions made to stockholders in liquidation of a corporation of all disguises and declares that they shall be considered for what they in effect are—purchases of all their outstanding stock by the liquidating corporations, and not dividends as generally understood, and as defined in section 201, subsection (a), and as used in section 216. So construed, subsection (c) of section 201 puts the stockholder who holds his stock up to the time of liquidation, and then in effect sells it to the corporation, upon exactly the same footing as the stockholder who sells his stock to another during the operating life of the corporation. The latter unquestionably, under the act of 1918, was required to pay both the normal and surtax upon any profit realized by him in the transaction. That is all the former was required to do under the act as here construed.

For the reasons stated, the court is forced to the conclusion that it was not intended by Congress that so-called liquidating dividends, to the extent of the profit received, should escape the normal tax.

In affirming the above decision of the District Court, the Circuit Court of Appeals for the Sixth Circuit tersely says (13 F. (2d) 1022):

After considering carefully the reasons urged against it, we feel satisfied to affirm the judgment (9 F. (2d) 691), and we do so

> upon the reasoning and conclusions of the District Judge. Although the half interest in the corporate assets which came to Langstaff was within the broad definition of "dividend" in section 201 (a), * * * yet the transaction was the very one specifically provided for in the last sentence of section 201 (c), and the half interest became the proceeds of the sale of Langstaff's stock in the corporation, instead of a corporate dividend. Only so can the sections be effectively read together.
>
> Judgment affirmed.

Petition for certiorari in the *Langstaff case* was denied November 1, 1926 (273 U. S. 721).

The same position is also adopted by the Board of Tax Appeals in *Appeal of John K. Greenwood,* 1 B. T. A. 291; *Appeal of Clarence LeBus,* 1 B. T. A. 733; *Appeal of J. H. Morrow,* 1 B. T. A. 1148; *Appeal of S. B. Quigley,* 2 B. T. A. 159; *Appeal of W. C. Schroth,* 2 B. T. A. 169; *Appeal of Estate of Joseph Arnold,* 2 B. T. A. 759; and *Appeal of J. E. Chandler,* 3 B. T. A. 146.

The Circuit Court of Appeals in the instant cases states that the *Langstaff case, supra,* and the *Greenwood appeal, supra,* are authorities against the view taken by it, but says (*Isadore N. Hellman case,* R. 26) it is "unable to agree with these decisions." The principal points of disagreement on the part of the Circuit Court of Appeals are three in number.

First, the court holds that Section 201 (c) is not an exception or limitation upon 201 (a), but is supplementary thereto, and it adopts the language of the District Court where a field is suggested in which 201 (c) might operate without conflict with 201 (a), as follows (*Isadore N. Hellman case*, R. 25):

> "Gains might well accrue from the fact that the capital stock when acquired, at or before February 28th, 1913, might be worth less than par, and before liquidation such stock might have advanced to par, or more, in which case a gain or profit would accrue to the stockholder, which should be taxed as income and not as a dividend, and which therefore should bear not only a surtax in a proper case, but a normal tax also."

The court further suggests that the phrase "taxed to the distributee as other gains or profits" used in Section 201 (c) is broad enough to include dividends, and that in so far then as a gain or profit resulting from a liquidating distribution represents earnings accumulated since February 28, 1913, it should be taxed as any other dividend; that is, it should not be subject to the normal tax.

It is true that this is a possible interpretation of the law, but it is not the most natural interpretation, nor the one that Congress intended. The Revenue Act of 1921 omitted the provisions of Section 201(c) of the Revenue Act of 1918 with respect to distributions in liquidation, but the Revenue Act of

1924 reenacted in substantially the same language that section of the 1918 Act in so far as it related to distributions in complete liquidation. In the Report of the Committee on Ways and Means of the House of Representatives on the revenue bill of 1924 (Report No. 179, 68th Congress, 1st session, p. 11) it is said:

> Section 201(c): (1) The existing law [Revenue Act of 1921] has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The proposed bill, as did the 1918 act, treats a liquidating dividend as a sale of the stock to the corporation and recognizes the true effect of such a distribution. (Interpolation ours.)

Likewise in the Report of the Senate Committee on Finance on the revenue bill of 1924 (Report No. 398, 68th Congress, 1st session, p. 11) it is said:

> Section 201(c): (1) The existing law [Revenue Act of 1921] has no provision similar to subdivision (c) of the bill, but the Treasury has construed the existing law as taxing liquidating dividends, not as capital gains, but as dividends subject to the surtax rates. The bill treats a liquidating dividend as a sale of the stock, with the result that the gain to the taxpayer is treated not as a dividend subject only to the surtax but as a gain from the sale of property which may be treated as a capital gain. *The treatment of*

> ***liquidating dividends under the bill is substantially the same as provided for in the revenue act of 1918.*** A liquidating dividend is, in effect, a sale by the stockholder of his stock to the corporation; he surrenders his interest in the corporation and receives money in place thereof. Treating such a transaction as a sale and within the capital gain provisions is consistent with the entire theory of the act and, furthermore, is the only method of treating such distributions which can be easily administered. (Interpolation and italics ours.)

Again, in the Conference Report on the revenue bill of 1924 (House Report No. 844, 68th Congress, 1st session, p. 14) it is said:

> Amendment No. 2: The House bill provided that the gain from a liquidating dividend, to the extent of the earnings and profits accumulated by the corporation since March 1, 1913, should be treated as a dividend and subject to the surtax rates. The Senate amendment strikes out this provision with the result that a liquidating dividend is to be treated as a sale of stock and taxable as a gain from the sale of property; and the House recedes.

Since there is no express provision as to distributions in liquidation in the 1921 Act, there would seem to be no force to the court's argument that Congress sought in that Act to correct an erroneous interpretation by the Treasury Depart-

ment of the previous Act. As the 1921 Act is prospective the more reasonable assumption is that the omission simply indicates a change in legislative policy in that Act alone.

On the other hand, the use by Congress of substantially the same language with respect to distributions in complete liquidation in both the 1918 and the 1924 Acts, expressly indicating that it intended that language in the later Act to mean exactly what the Treasury regulations had already interpreted the earlier Act to mean, may reasonably be said to be a legislative approval of the Treasury Department's interpretation of the 1918 Act. If the attention of the court below had been called to this legislative history of the 1924 Act it might well have reached a different conclusion. The Act of 1924 was passed June 2, 1924. Up to that time there was no reported decision of the courts in which the construction by the Treasury Department of the 1918 Act had been even questioned. It is also not without significance that in the 1924 Act Congress expressly rejected a proposal to treat such distributions in complete liquidation as dividends. The provisions of the 1926 Act respecting complete liquidations are substantially the same as the 1924 Act. (Act of February 26, 1926, c. 27, Sec. 201(c), 44 Stat. 9, 11; U. S. C. App., Title 26, Sec. 932.

Second, it is objected by the Circuit Court of Appeals that under the contention of the Government (*Isadore N. Hellman case,* R. 27)—

> if distribution of the surplus accumulated since February 28, 1913, had been made in the form of a dividend declared by the corporation the day before it was intended to liquidate and dissolve the same, it would have been a dividend and not subject to the normal tax; if distributed the next day in a final liquidation of the corporation it would be subject to the normal tax. The manner of distribution, if this position is correct, determines taxability, and not the character of the income.

This objection does not carry conviction. The fact is that in the cases at bar the amounts distributed were not distributed as ordinary dividends. The fact that they might have been so distributed is not material. The possibility of occasional instances of apparent hardship in the incidence of the tax may be conceded, but that can not affect the tax liability of respondents. It is well known that there is a wide variety of cases in which tax liability varies according to the form which the transaction actually takes. For a discussion upon this topic see Magill's "Notes on the Revenue Act of 1924" (24 Columbia Law Review, p. 836, at p. 844 et seq.).

Third, the court holds that the construction contended for by the Government and sustained in the *Langstaff case* "results in a double income tax, as these earnings of the corporation have already been fully taxed." (*Isadore N. Hellman case,* R. 27.)

This objection also fails to carry conviction. The result of taxing a distribution in liquidation as a

sale by the stockholder of his shares to the corporation is exactly the same as that which would follow a sale of the stock to a third party. If the stockholders in these cases had sold their stock prior to dissolution of the corporation, their tax liability would admittedly be determined in the same manner as here contended for and any gain over the cost or March 1, 1913, value would have been subject both to normal tax and surtax regardless of the extent to which the sale price reflected surplus upon which the corporation had already paid normal tax. This Court has sustained the tax on the sale of stock under such circumstances without any suggestion that it amounted to double taxation. See *Merchants' Loan & Trust Company* v. *Smietanka,* 255 U. S. 509; *Goodrich* v. *Edwards,* 255 U. S. 527, and similar cases. However, even if the interpretation of Section 201(c) did amount to double taxation—and the Government contends that it does not—effect should still be given to the provision. Double taxation is to be avoided if possible (*Tennessee* v. *Whitworth,* 117 U. S. 129), but there is no constitutional or legal objection to it (*Cream of Wheat Company* v. *County of Grand Forks, North Dakota,* 253 U. S. 325); and where Congress has clearly expressed its intention, as it has here, or where double taxation naturally and unavoidably results from the language of the law, the courts will sustain it. *Patton* v. *Brady,* 184 U. S. 608; *Porto Rico Coal Company* v. *Edwards,* 275 Fed. 104; *Ketterer* v. *Lederer,* 269 Fed. 153; *United States* v. *J.*

D. Iler Brewing Company, 121 Fed. 41; and *Westfall* v. *Shook,* 29 Fed. Cas. No. 17448.

Finally, the court says (*Isadore N. Hellman case,* R. 26):

> The question involved in this case is not easy of solution. It may fairly be considered a close one, and not free from doubt. Plausible argument can be presented for the position taken by either side to the controversy as to the construction of subdivisions (a) and (c) of section 201.

And then the court proceeded to apply the rule that doubts are to be resolved in favor of the taxpayer. Aside from the fact that the legislative history of the law seems to remove all possibility of doubt, the action of the court in applying the rule as to doubts overlooks another important rule of construction which deserves consideration in the decision of the case at bar, and that is the effect of long-continued administrative construction. Article 1548 of Treasury Regulations 45 has been in effect since April 17, 1919—nearly nine years. It has been uniformly applied by the Commissioner of Internal Revenue to all cases arising during that period. It has been consistently sustained by the Board of Tax Appeals in the numerous cases above cited. The provision of law upon which the regulation is based has been reenacted by Congress as Section 201 (c) in both the Revenue Acts of 1924 and 1926 without substantial change and with knowledge of the interpretation previously placed

upon it by the Commissioner. This is the first instance in which the position of the Commissioner has been rejected by a court. Under these circumstances it is submitted that this is certainly a most appropriate case in which to follow an administrative construction, whatever doubt there might be as to the meaning of the law if the question were a new one. *National Lead Company* v. *United States,* 252 U. S. 140; *Maryland Casualty Company* v. *United States,* 251 U. S. 342; *Heiner* v. *The Colonial Trust Company, etc.,* Nos. 219 and 220, October Term, 1927, this Court, decided November 21, 1927.

Overturning long-continued administrative construction of the Revenue Acts is especially to be deplored. It results in administrative confusion and in discrimination between taxpayers whose cases have been finally closed and those whose cases are still open.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgments of the Circuit Court of Appeals in the cases at bar should be reversed.

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DECEMBER, 1927.

○

Supreme Court, U. S.
FILED
DEC 27 1927
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1927.

ARNOLD J. HELLMICH, Collector of Internal Revenue, etc., Petitioner,
vs.
ISADORE N. HELLMAN, Respondent.
No. 299.

ARNOLD J. HELLMICH, Collector of Internal Revenue, etc., Petitioner,
vs.
MILTON C. HELLMAN, Respondent.
No. 300.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

STATEMENT OF PETITIONER'S CLAIMS.

Petitioner does not assail the reasoning of the Circuit Court of Appeals, but asks for a reversal of these judgments chiefly on two grounds: First, the alleged legisla-

tive history of Section 201 (c) of the Revenue Act of 1918, and, second, that the interpretation of a statute by the executive department charged with its execution is entitled to great weight.

SUMMARY OF RESPONDENTS' ANSWER TO PETITIONER'S CLAIMS.

Respondents do not deny that in ascertaining the meaning of a statute resort may be had, in a proper case, to the legislative history of the act as well as to the construction given to it by the executive department. But these are mere rules of construction, surely of no higher rank than the many other rules of construction, and subordinate, perhaps, to a great many of them. The general principle is that the statute itself furnishes the best means for its own exposition, and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, a resort to extrinsic facts is not permitted to ascertain their meaning.

> Thomas v. Vandegrift, 162 Fed. Rep. 645, 89 C. C. A. 437.

Applying that principle to the case in hand, it is respondents' contention that neither of the rules invoked by petitioner is applicable, because the sense of the statute can be readily ascertained from its language by the application of the elementary rules of statutory construc-

tion. We shall, however, briefly notice petitioner's contention based on these rules.

LEGISLATIVE HISTORY OF THE ACT.

Petitioner sets out in his brief what he calls a legislative history of the act, but an examination of the matter offered reveals that it consists of excerpts from congressional reports made to the Sixty-eighth Congress with reference to the Revenue Act of 1924, C. 234, 43 Stat. 253, 255, Sec. 201 (c), and a brief reference to the Revenue Act of 1926, C. 27, 44 Stat. 911, Section 201 (c).

The Revenue Act of 1924 was enacted five years after the passage of the Revenue Act of 1918, and the Revenue Act of 1926 was passed almost seven years after the Revenue Act of 1918. The Revenue Act of 1918 was enacted by the Sixty-fifth Congress. The Revenue Acts of 1924 and 1926 were enacted by the Sixty-eighth and Sixty-ninth Congresses, respectively. The reports mentioned in petitioner's brief were made to the Sixty-eighth Congress with reference to the then pending Revenue Act of 1924, and contain a few words on the part of the committee expressing its opinion of the intention of the Sixty-fifth Congress in enacting Section 201 (c) of the Revenue Act of 1918. It requires no argument to demonstrate that this is no legislative history of the Revenue Act of 1918, but a mere expression of opinion of members of a subsequent Legislature upon the meaning of a statute previously enacted. Such expressions of opinion have no

legal force whatsoever. If they could, by any stretch of the imagination, be termed a legislative construction of an act, they would still be without force, because they do not constitute a "contemporaneous" construction. They do not represent an expression of the Congress that enacted the law. As the Supreme Court of Minnesota aptly said of such a document:

> "The opinion of subsequent legislators upon the meaning of a statute is entitled to no more weight than that of the same men in a private capacity."
>
> Bingham v. Winona County, 8 Minn. 441, 448, 449.

With reference to the claims in petitioner's brief that the Revenue Acts of 1924 and 1926 contain substantially the same provisions as the Act of 1918 and may, therefore, be considered a legislative approval of the construction put upon section 201 (c) by the Treasury Department, we call attention to the fact that the Revenue Act of 1921, enacted by the Sixty-sixth Congress, contained no provision whatever similar to that of Section 201 (c) of the Revenue Act of 1918. So that Section 201 (c) of the Revenue Acts of 1924 and 1926 does not merely continue Section 201 (c) of the Act of 1918, but is an entirely new act on the subject. It should also be noted that Section 201 (c) of the Revenue Acts of 1924 and 1926 differs radically from Section 201 (c) of the Revenue Act

of 1918, in that both of the later acts omit from their section 201 (c) the concluding words of Section 201 (c) of the Act of 1918, to wit:

> "Any gain or profit realized thereby shall be taxed to the distributee as other gains or profits."

The importance of this clause was recognized by the Circuit Court of Appeals, which said that it alone was sufficient warrant for the exemption of the distribution in this case from the normal tax (R. p. 25).

RULE OF DEPARTMENTAL CONSTRUCTION.

That the practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the executive departments of the Government is entitled to respect is, as stated, a mere rule of construction, one among a number of rules to be applied in proper cases. It is not absolute, nor does it preclude inquiry by the courts as to the original correctness of such construction. If the meaning of the statute can be clearly ascertained from all its parts and provisions a resort to extrinsic facts is not permitted to ascertain the meaning. And if, when tested by the rules of statutory construction, the departmental construction of the act is erroneous, the courts will not hesitate to reject the departmental construction, however long it may have continued.

Houghton v. Payne, 194 U. S. 88, 99, 100;
Webster v. Luther, 163 U. S. 331, 342;
U. S. v. Johnston, 124 U. S. 236, 253;
U. S. v. Graham, 110 U. S. 219, 221.

And if the departmental construction were obviously or clearly wrong, it would be the duty of the Court to so adjudge.

U. S. v. Finnell, 185 U. S. 236, 244;
U. S. v. Tanner, 147 U. S. 661, 663.

The fact that the Commissioner of Internal Revenue may have construed a statute does not oust the courts of their jurisdiction as the ultimate expositors of the law. If that were the case, the Commissioner of Internal Revenue, undertaking to interpret statutes by formulating regulations in advance of the actual event, could usurp the functions of the courts and draw to himself judicial powers. Such is not the law. It is for the courts to construe a statute, and not the executive departments of the Government, and where the Court is satisfied that the statute requires a different construction than that adopted by the department, a Treasury regulation rises to no higher dignity than an expression of opinion.

Ex parte Mikell, 253 Fed. Rep. 817, 820;
U. S. ex rel. Simonian v. Tod, Commissioner, 297 Fed. Rep. 172, 174;
Douglas v. Edwards, 298 Fed. Rep. 229, 245.

We, therefore, submit that the rule that regulations of the Treasury Department made in the construction of the statute are entitled to respect ranks no higher than the other rules of construction, and is distinctly inferior in rank to those rules which require that the meaning of a statute is to be ascertained whenever possible from the language of the act itself, without resorting to extrinsic matters.

The plea that an affirmance of these judgments and the overturning of the departmental construction of the Act of 1918 would result in discrimination between taxpayers because some of them have been compelled to pay taxes under the erroneous construction and others would escape when that error was corrected, is, to say the least, somewhat peculiar. It amounts to the plea that because injustice has been done to some in the past it must continue to be done to everybody for the sake of justice. The mere statement of the argument is its own refutation.

ARGUMENT AGAINST THE COMMISSIONER'S CONSTRUCTION OF SECTION 201 (c) OF THE REVENUE ACT OF 1918.

The distribution in question having clearly been made out of earnings or profits accumulated by the corporation since February 28, 1913, is a dividend under Section 201 (a) of the Revenue Act of 1918 and exempt from normal tax under Section 216 (a) of that act unless it is deprived of its status as a dividend by virtue of Section 201 (c) of the Revenue Act of 1918. The Commissioner of Internal Revenue has construed Section 201 (c) as a declaration that such a distribution is not a dividend within the meaning of the Revenue Act of 1918. That construction is clearly erroneous for the following reasons:

1. It has the effect of imposing a tax of 8 per cent upon the respondents by mere construction. Under Section 201 (a) of the Revenue Act of 1918 this distribution is clearly a dividend. If Congress had intended by Section 201 (c) to declare that such distribution is not a dividend when made in the liquidation of a corporation, it would have been easy to say so. Congress did not so provide by any express language, and, in the absence of specific language to that effect, no such intention is presumed.

Shwab v. Doyle, 258 U. S. 529, 536.

This Court has repeatedly held that before any tax can be imposed on a citizen the Legislature must so declare by clear and unambiguous words. Section 201 (c) of the Act of 1918 contains no language imposing any tax. Hence, no tax can be predicated upon it.

> Eidman v. Martinez, 184 U. S. 578, 583;
> U. S. v. Isham, 17 Wall. (84 U. S.) 496, 504;
> Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 416.

2. It extends the provisions of the Revenue Act by implication beyond the clear import of the language used. The Commissioner takes the provision in section 201 (c) that "amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares" as an expression by Congress that gains realized in the course of liquidation by a corporation shall be subject to both normal and surtax, although it contains no express language to that effect.

Dismissing for the present the question of the effect of the clause following immediately thereafter, which directs how such gains shall be taxed, we answer this contention by saying that if Congress intended to impose both normal tax and surtax on accumulated earnings when distributed by a corporation in liquidation, the statute does not so state in clear and unambiguous language. Being a taxing act, its language cannot be stretched or its provisions extended by implication to

accomplish a supposed intention on the part of the lawmaker. The intention of the lawmaker is to be gathered from the words of the statute, and assuming, though not admitting, that Congress may have had the intention of subjecting profits so distributed to both normal tax and surtax, a mere intention to tax would not be sufficient in the absence of appropriate language imposing the tax. A statute dealing with taxation is strictly construed against the sovereign and in favor of the taxpayer.

U. S. v. Wigglesworth, Fed. Cas. 16, 690;
2 Story 369;
Gould v. Gould, 245 U. S. 151, 153;
Rice v. U. S., 53 Fed. Rep. 910, 911, 912;
U. S. v. Merriam, 263 U. S. 179, 188;
Haiku Sugar Co. v. Johnston, 249 Fed. Rep. 103.

3. If the meaning of the statute is doubtful, the Commissioner's construction of the statute in favor of the Government violates the rule that doubts in a taxing act are to be resolved in favor of the taxpayer.

Powers v. Barney, 5 Blatch. 202, 203;
Hartranft v. Wiegmann, 121 U. S. 609, 616;
American Net etc. Co. v. Worthington, 141 U. S. 468, 474;
Benziger v. United States, 192 U. S. 38, 55.

4. It imposes double taxation without express words in the statute to that effect.

We do not contend that double taxation is necessarily unconstitutional, but we deny that Congress has imposed double taxation in this case. Petitioner has pointed out no provision of the Revenue Law of 1918 which expressly imposes double taxation on these distributions, and it is a well-established rule that the intent to impose double taxation is never presumed. Whenever a citizen is to be subjected to a double liability the language of the statute must make that intention clear.

> Malley v. Hecht, 265 U. S. 144, 159;
> Tennessee v. Whitworth, 117 U. S. 129, 137.

Petitioner cites as an example of double taxation the subjection of gains on sales of stock to both normal and surtax, and ascribes it to the theory that the seller is really being doubly taxed on his dividends. "This example does not carry conviction." One who sells his stock in a going corporation and receives the enhancement represented by its earnings is really selling his right to receive the dividends when they are declared exempt from the normal tax, and the man who buys the stock receives the dividend when declared free from the normal tax. In that case the seller is simply anticipating his dividends and pays a tax for the privilege. But he nevertheless makes a sale, and the profit he receives is as much a gain as though he had sold merchandise at a profit. The buyer of the stock acquires the exemption from normal tax. One who participates in the liquida-

tion of a corporation surrenders his stock to the corporation and receives his proportionate share of the assets of the corporation. He sells no right to receive dividends tax free, as is the case in an ordinary sale of stock, but retains it in its entirety. There is no real analogy between a sale of stock in a going concern and the complete liquidation of a corporation. They are two entirely different things, and there is no internal evidence in the statute that the Sixty-fifth Congress attempted to assimilate them.

5. The Commissioner's construction of the statute is erroneous because it ignores the concluding provision of Section 201 (c) that "any gain or profit realized thereby shall be taxed to the distributee **as other gains or profits,**" and treats it as though it read that any such gain or profit shall be taxed to the distributee **as a gain on a sale of property.**

The gain realized by the respondents in the liquidation of their corporation was within the broad definition of a dividend in Section 201 (a) of the Act of 1918, and would have been exempt from normal tax if made by a going concern. It was subjected to both normal and surtax for the sole reason that it resulted from a distribution made in the liquidation of a corporation. This, respondents contend, is in direct violation of the mandate of the statute, which requires that such gains shall be taxed to the distributee as **other gains or profits.**

LANGSTAFF v. LUCAS, 9 FED. REP. (2d) 691, 694, AFFIRMED 13 FED. REP. (2d) 1022.

Petitioner relies on this case, which supports the Government's views. The Circuit Court of Appeals in the instant cases, however, found itself unable to agree with that decision and decisions of the Board of Tax Appeals to the same effect cited in the Government's brief. The Circuit Court of Appeals in its opinion remarked that the Langstaff case was evidently based on Lynch v. Hornby, 247 U. S. 339, and the companion case of Lynch v. Turrish, 247 U. S. 221, and that Article 1548, Regulations 45, is also very evidently based on the same case (R. pp. 24, 25). It is pointed out that these two cases were decided under the Revenue Act of October 3, 1913, **which contains no definition of the term "dividend,"** and that the question in both cases, as pointed out in Holmes Federal Taxes (1923 Edition, p. 625, and 1925 Edition, p. 830), was whether a distribution of earnings accumulated prior to March 1, 1913, should be considered as dividends (R. p. 27). The status of earnings or profits accumulated subsequent to March 1, 1913, was not considered, and the cases are no authortiy for the proposition that a distribution by a corporation in liquidation out of its earnings accumulated since February 28, 1913, is not a dividend under Section 201 (c) of the Revenue Act of 1918.

But apart from those considerations, the fact is that the statute under which Lynch v. Hornby was decided

did not define the term "dividend," whereas the statute under which Langstaff v. Lucas arose contained a very complete and specific definition of the term.

In Lynch v. Hornby, the Court was justified in assuming that the term "dividend" in the Act of October 3, 1913, was used in the sense in which it was generally understood, and the Court was, therefore, at liberty to say what Congress intended to include under the word "dividend," but in the Langstaff case there was no such situation. Congress defined the word "dividend" and the Court was not at liberty to substitute its own definition for that given in the act. Nevertheless, the Court in he Langstaff case took as the basis of its decision the definition of the term "dividend" given by Mr. Justice Pitney in Lynch v. Hornby instead of the definition given by Congress in Section 201 (a) of the Revenue Act of 1918. It also overlooked or ignored the provision in Section 201 (c) of the Revenue Act of 1918 that gains or profits realized in a liquidation shall be taxed to the distributee **as other gains or profits.** If that clause means anything at all, it forbids distinctions in the taxation of distributions out of corporate earnings accumulated since February 28, 1913. It requires that all distributions of earnings accumulated since that date shall be taxed alike. That requirement was not present in the Act of October 3, 1913. Under the Revenue Act of 1918 it is the character of the income out of which the distri-

bution is made, and not the manner of distribution, that determines its status as a dividend vel non.

CONCLUSION.

Petitioner's grounds for reversal are substantially two in number, viz.: That the legislative history of the act shows that the Commissioner's interpretation of Section 201 (c) of the Act of 1918 accords with the intention of Congress, and that long-continued administrative construction of the act entitles it to special consideration at the hands of the Court.

The so-called legislative history of the act proves, on examination, to be a mere expression of private opinion on the part of the members of a subsequent Congress five years after the enactment of the statute. And the long-continued administrative construction of the act is merely a rule of construction not binding on the courts, and never so when the departmental construction is erroneous. The opinions of the courts and the authorities cited show clearly that the administrative construction of the act by the Treasury Department is erroneous in that it violates a number of the elementary rules of statutory construction which have ever been regarded as of vital importance to the liberty of the citizen. It is likewise evident that the case of Langstaff v. Lucas and the decisions of the Board of Tax Appeals to the same effect are likewise erroneous, being based upon the same miscon-

struction of the statute, and should, therefore, not be approved.

Wherefore, we respectfully submit that the judgments of the Circuit Court of Appeals in these cases should be affirmed.

Respectfully submitted,

HENRY H. FURTH,
Attorney for Respondents.

SUPREME COURT OF THE UNITED STATES.

Nos. 299, 300.—October Term, 1927.

Arnold J. Hellmich, Collector of Internal Revenue, etc., Petitioner, 299 *vs.* Isadore N. Hellman. Arnold J. Hellmich, Collector of Internal Revenue, etc., Petitioner, 300 *vs.* Milton C. Hellman.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 20, 1928.]

Mr. Justice Sanford delivered the opinion of the Court.

The two Hellmans brought these suits against the Collector to recover additional income taxes assessed against them for the year 1919, under Title II of the Revenue Act of 1918,[1] and paid under protest. They recovered judgments in the District Court, which were affirmed by the Circuit Court of Appeals. 18 F. (2d) 239 and 244.

The question here is whether the gains realized by stockholders from the amounts distributed in the liquidation of the assets of a dissolved corporation, out of its earnings or profits accumulated since February 28, 1913, were taxable to them as other "gains or profits," or whether the amounts so distributed were "dividends" exempt from the normal tax.

Sec. 201(a) of the Act defined the term "dividend" as "any distribution made by a corporation . . to its shareholders . . , whether in cash or in other property . . , out of its earnings or profits accumulated since February 28, 1913 . . " Sec. 201(c) provided that: "Amounts distributed in the liquidation of a corporation shall be treated as payments in exchange for stock or shares, and any gain or profit realized thereby shall be taxed to the dis-

[1] 40 Stat. 1057, 1058, c. 18.

tributee as other gains or profits." Sec. 216(a) provided that for the purpose of determining the "normal tax" upon the net income of an individual (§ 210), there should be allowed as a credit the "amount received as dividends from a corporation which is taxable . . upon its net income."

Treasury Regulations 45, which were promulgated under the Act, stated on the one hand, in Art. 1541, that for the purpose of the statute "dividends" comprise distributions made by a corporation to its stockholders "in the ordinary course of business, even though extraordinary in amount;" and, on the other hand, in Art. 1548, that: "So-called liquidation or dissolution dividends are not dividends within the meaning of the statute, and amounts so distributed, whether or not including any surplus earned since February 28, 1913, are to be regarded as payments for the stock of the dissolved corporation. Any excess so received over the cost of his stock to the stockholder, or over its fair market value as of March 1, 1913, if acquired prior thereto, is a taxable profit. A distribution in liquidation of the assets and business of a corporation, which is a return to the stockholder of the value of his stock upon a surrender of his interest in the corporation, is distinguishable from a dividend paid by a going corporation out of current earnings or accumulated surplus when declared by the directors in their discretion, which is in the nature of a recurrent return upon the stock."[2] These Regulations, with a change made in 1921 as to the second sentence of Art. 1548,[3] are still in effect so far as distributions in liquidation under the Act are concerned.

Each of the Hellmans owned one-half of the capital stock of a corporation which had a net surplus of $46,466.27, of which at least $31,545.58 consisted of earnings and profits accumulated since February 28, 1913. In 1919, the corporation was dissolved and liquidated and its assets were distributed to the stockholders.

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[2]Regulations 45, 1919 ed., 237, 240.

[3]By Treas. Dec. 3206 the following sentences were substituted for the second sentence: "Any excess so received over the cost of his stock to the stockholder constitutes income to such stockholder. However, if such stock was acquired prior to March 1, 1913, and the fair market value as of such date was greater than the cost but less than the amount so distributed, the taxable income is the excess over such fair market value of the amount received, but no gain is recognized if the amount received, although more than cost, is less than the fair market value of the stock on March 1, 1913." 23 Treas. Dec. Int. Rev., 763, 769.

In this liquidation each of the Hellmans realized a gain of $15,004.55 in the distribution made out of the earnings and profits accumulated since February 28, 1913. Each in his income tax return claimed that this was a "dividend" which under § 216(a) was to be credited on his net income for the purpose of the normal tax. The Commissioner of Internal Revenue, ruling these were gains subject to the normal tax, disallowed the claims and made the additional assessments here involved.

The decision of the Circuit Court of Appeals in this case is in direct conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Langstaff* v. *Lucas* (C. C. A.) 13 F. (2d) 1022.

The controlling question is whether the amounts distributed to the stockholders out of the earnings and profits accumulated by the corporation since February 28, 1913, were to be treated under § 201(a) as "dividends", which were exempt from the normal tax; or, under § 201(c) as payments made by the corporation in exchange for its stock, which were taxable "as other gains or profits."

It is true that if § 201(a) stood alone its broad definition of the term "dividend" would apparently include distributions made to stockholders in the liquidation of a corporation—although this term, as generally understood and used, refers to the recurrent return upon stock paid to stockholders by a going corporation in the ordinary course of business, which does not reduce their stock holdings and leaves them in a position to enjoy future returns upon the same stock. See *Lynch* v. *Hornby*, 247 U. S. 339, 344-346; and *Langstaff* v. *Lucas* (D. C.) 9 F. (2d) 691, 694.

However, when § 201(a) and § 201(c) are read together, under the long-established rule that the intention of the lawmaker is to be deduced from a view of every material part of the statute, *Kohlsaat* v. *Murphy*, 96 U. S. 153, 159, we think it clear that the general definition of a dividend in § 201(a) was not intended to apply to distributions made to stockholders in the liquidation of a corporation, but that it was intended that such distributions should be governed by § 201(c), which, dealing specifically with such liquidation, provided that the amounts distributed should "be treated as payments in exchange for stock" and that any gain realized thereby should be taxed to the stockholders "as other gains or profits." This brings the two sections into entire harmony, and gives to each its natural meaning and due effect. The Treasury Regulations correctly interpreted the Act as making § 201(a) applicable to a distribution made by a going corporation

to its stockholders in the ordinary course of business, and § 201(c) applicable to a distribution made to stockholders in liquidation of the corporation. And this is in accord with the rulings of the Board of Tax Appeals. *Appeal of Greenwood,* 1 B. T. A. 291, 295; *Appeal of Chandler,* 3 B. T. A. 146, 149.

The gains realized by the stockholders from the distribution of the assets in liquidation were subject to the normal tax in like manner as if they had sold their stock to third persons. The objection that this results in double taxation of the accumulated earnings and profits is no more available in the one case than it would have been in the other. See *Merchants' L. & T. Co.* v. *Smietanki,* 255 U. S. 509; *Goodrich* v. *Edwards,* 255 U. S. 527. When, as here, Congress has clearly expressed its intention, the statute must be sustained even though double taxation results. See *Patton* v. *Brady,* 184 U. S. 608; *Cream of Wheat Co.* v. *Grand Forks,* 253 U S. 325, 330.

The decree is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.